United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEAL

FOR THE SECOND CIRCUIT

Docket No.74-8192

SPECIAL PROSECUTOR OF THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, AND DIRECTOR, UNITED STATES MARSHALS SERVICE,

Defendants-Appellees.

APPENDICES FOR PLAINTIFF-APPELLANT

MAURICE H. NADJARI
Deputy Attorney General
Attorney for Plaintiff-Appellant
2 World Trade Center
New York, New York 10047

STEPHEN J. FALLIS,
JORDAN J. FISKE,
Of Counsel.

INDEX TO APPENDICES

SUPREME COURT, STATE OF NEW YORK
EXTRAORDINARY SPECIAL AND TRIAL TERM
COUNTY OF NEW YORK

People of the State of New York against Emmet Cusack, Chester Dorris and John McElhearn Defendants	:	
People of the State of New York against Bernard Geik Defendant	:	ORDER TO SHOW CAUSE
People of the State of New York against Murad Nercessian Defendant	:	

Upon a reading of the annexed affidavit of Special Assistant Attorney General Stephen J. Fallis; it is

ORDERED: that the United States Attorney for the Southern District of New York and the Chief United States Marshal show cause why an order of this Court should not be entered directing them to produce Detective Robert Leuci before a Grand Jury empanelled by this Court; and it is further

ORDERED: that the United States Attorney for the Southern District of New York and the Chief United States Marshal show cause why they should not desist from interfeing with and preventing the appearance and testimony of Detective Robert Leuci beford a Grand Jury empanelled by this Court; and it is further

ORDERED: that this writ is returnable before this Court on May 6, 1974 at 10:00 o'clock in the morning in the Criminal Courts Building located at 100 Centre Street, New York County.

John M. Murtagh
Justice of the Supreme Court

SUPREME COURT, STATE OF NEW YORK
EXTRAORDINARY SPECIAL AND TRIAL TERM
COUNTY OF NEW YORK

People of the State of New York against Emmet Cusack, Chester Dorris and John McElhearn Defendants	
People of the State of New York against Bernard Geik Defendant	ORDER TO SHOW CAUSE
People of the State of New York against Murad Nercessian Defendant	

STEPHEN J. FALLIS, being duly sworn, deposes and says:

I am a Special Assistant Attorney General in the Office of the Special Prosecutor who is charged with the responsibility of prosecuting the above entitled indictments in which Robert Leuci is a principal witness. I am familiar with the facts in this case.

This affidavit is made in support of this office's request for an order to show cause directing the United States Attorney and the Chief United States Marshal for the Southern District of New York to produce Robert Leuci before the Grand Jury in New York County so that he may be questioned concerning matters under investigation by that body.

Detective Robert Leuci is presently employed as a New York City Police Officer. During 1971 and part of 1972, Detective Leuci became an undercover police agent in cooperation with the Knapp Commission and the United States Attorney's Office. During that period of time Detective Leuci had a number of conversations with corrupt individuals in the New York City Police Department and in the criminal justice system Many of these conversations were electronically recorded by an electronic device which was concealed on Leuci's person.

In 1972, Detective Leuci testified in a federal criminal trial. He admitted that he had been previously involved in four prior criminal transactions, but he denied any further complicity in wrongdoing.

In August of 1973 the United States Attorney referred Detective Leuci and the evidence he accumulated to this office. because the federal government did not have jurisdiction to prosecute the crimes disclosed by the evidence. This delay - of approximately two years - has caused difficulties in presenting these cases to the Grand Jury.

As a result of Leuci's testimony, which was corroborated in each case by an electronic recording, the Extraordinary and Special Grand Juries of Bronx County, Kings County, and New York County returned indictments. Detective Leuci has also been a witness in several other cases which are pending before the Extraordinary and Special Grand Jury in New York County.

On April 18, 1974, Detective Leuci advised me that he had previously testified falsely in the federal prosecution and that he wanted to make a full and complete disclosure to us [illegible] criminal activities. He indicated that his criminal activities far exceeded what he had previously admitted in the course of the federal trial.

Detective Leuci advised me further that in addition to divulging these matters to me he wished to divulge these criminal transactions to the United States Attorneys in the Eastern and Southern Districts in New York. I told Leuci that I thought that the procedure he suggested was reasonable.

Thereafter, I attempted to discuss these matters with Detective Leuci. My efforts to obtain Leuci's testimony in this matter have been repeatedly frustrated by the United States Attorney's Office.

Last week Assistant United States Attorney Giuliani told me that his office will not permit Detective Leuci to appear at the Special Prosecutor's Office for questioning, nor would Giuliani disclose any facts concerning Detective Leuci's recantation. After my conversation with Giuliani, an investigator from this office was permitted to see Detective Leuci, only after I had guaranteed that we would not serve Leuci with a subpoena nor would the investigator question him about his prior misconduct.

In addition to my conversation with Assistant United States Attorney Giuliani, I also discussed the matter with Detective Leuci. Leuci advised me that an Assistant United States Attorney had ordered him not to reveal his new disclosures of the misconduct to members of this office.

Lastly, the United States Attorney's Office has taken additional steps to prevent Detective Leuci from being subpoenaed before a State Grand Jury. Prior to last week Leuci had been body-guarded by New York City Police Officers for a number of years. After his recantation Detective Leuci was transferred to the custody of Federal Marshals in order to prevent his being summoned before an Extraordinary and Special Grand Jury [illegible] New York County.

These actions of the United States Attorney in preventing Detective Leuci from divulging additional criminal activities and from testifying before our Grand Jury is an arbitrary and unwarranted intrusion into this State's prosecutorial, judicial, and Police functions. It has impeded the preparation for trial of outstanding indictments pending before this court. It has seriously obstructed the presentations of other criminal cases pending before our Grand Jury.

We have repeatedly offered our cooperation in this investigation - unfortunately that offer of cooperation has been rejected by the United States Attorney.

We are seeking to obtain evidence of Detective Leuci's testimony and recantation so that we can intelligently appraise the trial status of outstanding indictments and to determine whether we can and should vouch for Leuci's credibility to a Grand Jury or a petit jury.

Wherefore your deponent respectfully requests that this Court direct the United States Attorney for the Southern District of New York and the Chief United States Marshal to produce Detective Robert Leuci before the Extraordinary Special Grand Jury in New York County and that they desist from interfering with and preventing the appearance of Detective Leuci before the Grand Jury.

Stephen J. Fallis

Stephen J. Fallis

Sworn to before me
this 1st day of May 1974.

csh

SUPREME COURT OF THE STATE OF NEW YORK

EXTRAORDINARY SPECIAL AND TRIAL TERM

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

— *against* —

Ernst Jusack, Chester Norris

and John Wellbourn

Defendant

ORDER TO SHOW CAUSE
AND AFFIDAVIT

MAURICE H. NADJARI

OFFICE OF THE SPECIAL STATE PROSECUTOR
2 WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

COUNTY OF NEW YORK

People of the State of New York :

against :

Emmet Cusack, Chester Dorris and John McIlhearn, :

Defendants. :

People of the State of New York :

against :

Bernard Geik, : NOTICE OF REMOVAL

Defendant. :

People of the State of New York :

against :

Murad Nercessian, :

Defendant. :

S I R S :

PLEASE TAKE NOTICE that a verified petition, a copy of which is annexed hereto, removing to the Southern District of New York the Order To Show Cause, directed to the United States Attorney and the Chief United States Marshal of the Southern District of New York, which is presently pending in the Supreme Court of the State of New York, County of New York, under the caption set forth above, was filed this day with the Clerk of said District

court pursuant to the provisions of Title 28, U.S.C. § 1442(a)(1).

Dated: New York, New York

May 1, 1974

Yours, etc.,

Paul J. Curran

PAUL J. CURRAN
United States Attorney for the
Southern District of New York,
Attorney for the Petitioner
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone No.: (212) 264-6318

APPENDIX "C"

TO:

CLERK, SUPREME COURT
STATE OF NEW YORK
EXTRAORDINARY SPECIAL
AND TRIAL TERM,
COUNTY OF NEW YORK
100 Centre Street
New York, New York

MAURICE H. NADJARI, ESQ.
Special State Prosecutor
2 World Trade Center
New York, New York 10047

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPECIAL STATE PROSECUTOR OF THE STATE OF NEW YORK,	:	
Plaintiff,	:	PETITION FOR REMOVAL
- v -	:	
UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, U.S. MARSHALS SERVICE,	:	74 Civ.
Defendants.	:	

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

Petitioners, the United States Attorney for the Southern District of New York and the Director, United States Marshals Service (formerly Chief United States Marshal) defendants in this action, by Paul J. Curran, United States Attorney for the defendants, respectfully state on information and belief that:

1. On May 1, 1974, the United States Attorney for the Southern District of New York was served with an Order to Show Cause, returnable May 2, 1974, at 10:00 A.M. before John M. Murtaugh, Justice of the Supreme Court, State and County of New York, why an order should not be entered directing said United States Attorney and the Chief United States Marshal to produce Detective Robert Leuci before a State Grand Jury, and ordering them to cease interfering with the appearance of Robert Leuci before said Grand Jury.

2. The United States Attorney for the Southern District of New York, and the Director, United States Marshals Service, (formerly Chief United States Marshal) are officers of the United States.

3. The relationship of the United States Attorney for the Southern District of New York and the Director, United States Marshal's Service for the Southern District of New York to Detective Leuci which is alleged in the papers submitted in support of the Order to Show Cause as the basis for the defendants' obligation to produce Detective Leuci before the State Grand Jury arises solely from past and continuing federal criminal investigations conducted by the defendants with Detective Leuci's assistance; and the Order to Show Cause which is the subject of this removal action seeks to direct the United States Attorney for the Southern District of New York and the Director, United States Marshal's Service, to act under color of office as officers of the United States.

4. The aforesaid Order to Show Cause may therefore be removed pursuant to the terms of 28 U.S.C. §1442(a)(1).

WHEREFORE, it is respectfully requested that the aforesaid Order to Show Cause be removed to this Court for hearing and determination pursuant to 28 U.S.C. §1441 et seq.

Dated: New York, New York
May 1, 1974

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the Petitioners
Office and P.O. Address:
U.S. Courthouse
Foley Square
New York, N. Y. 10007
Tel. No. (212) 264-6318

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

PAUL J. CURRAN, being duly sworn, deposes and says that he is the United States Attorney for the Southern District of New York, and as such has charge of the above entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters herein stated to be alleged on information and belief and that as to those matters he believes it to be true.

That the sources of deponent's information and the grounds of his belief are official records and files of the United States.

PAUL J. CURRAN
United States Attorney

Sworn to before me this
1st day of May 1974.

Notary Public

Sir:

You will pl
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duly entered
in the office

Dated, N. Y.,

To

Sir:

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at the office o

Borough of
New York, on
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heard.
Dated, N. Y.,

To

Sir:

You will please take notice that a _____ *of which the within is copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.*

Dated, N. Y., _____ 19___

Yours, etc.,

_____

United States Attorney,
Attorney for _____

To

_____

Attorney for _____

_____

Sir:

Please take notice that the within _____ *will be presented for settlement and signature to the Honorable* _____ *at the office of the clerk,* _____

_____

Borough of _____ *City of New York, on the* _____ *day of* _____, 19___, *at* _____ *o'clock in the* _____*noon, or soon thereafter as counsel can be heard.*

Dated, N. Y., _____ 19___

Yours, etc.,

_____

United States Attorney,
Attorney for _____

To

_____

Attorney for _____

Court Index No.

SUPREME COURT, STATE OF NEW YORK
EXTRAORDINARY SPECIAL AND TRIAL TERM : COUNTY OF NEW YORK

People of the State of New York.
-against-
Emmet Cusack, Chester Dorris and John McElhearn,
Defendants.

People of the State of New York
-against-
Bernard Geik,
Defendant.

People of the State of New York
-against-
Murad Nercessian,
Defendant.

NOTICE OF REMOVAL

PAUL J. CURRAN

Tel: 264-6318 *United States Attorney,*
Attorney for U.S.A.

Due service of a copy of the within is hereby admitted.

New York, _____, 19___

_____

Attorney for _____

To

_____

Attorney for _____

Form No. USA-33s-272
(Rev. 1-28-66)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SUPREME COURT, STATE OF NEW YORK
EXTRAORDINARY SPECIAL AND TRIAL TERM
COUNTY OF NEW YORK

- x

People of the State of New York :

against :

Emmet Cusack, Chester Dorris and John McElhearn :

Defendants :

- x

People of the State of New York : AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

against :

Bernard Geik :

Defendant :

- x

People of the State of New York :

against :

Murad Nercessian :

Defendant :

- x

STEPHEN J. FALLIS, being duly sworn, deposes and says:

I am a Special Assistant Attorney General in the Office of the Special Prosecutor who is charged with the responsibility of prosecuting the above entitled indictments in which Robert Leuci is a principal witness. I am familiar with the facts in this case.

This affidavit is made in support of this office's request for an order to show cause directing the United States Attorney and the Chief United States Marshal for the Southern District of New York to produce Robert Leuci before the Grand Jury in New York County so that he may be questioned concerning matters under investigation by that body, and to desist from interfering with and preventing the appearance of Detective Leuci

before the Grand Jury.

The United States Attorney's Office has arbitrarily and unilaterally interrupted and disrupted the state judicial, prosecutorial and police functions by improperly interfering with the states's efforts to obtain the testimony of a vital witness. Everyday that this intolerable situation is permitted to continue the problems caused thereby increase significantly.

New York States' Interest

Detective Robert Leuci is vitally important to New York's judicial, prosecutorial and police functions. As to judicial interest, Detective Leuci is the People's principal witness in four outstanding indictments pending in New York States Supreme Court. The preparation of these cases for trial and the handling of pre-trial motions in relation to these cases has already been delayed and adversely affected by the absence of Detective Leuci. For example, we have an obligation to confirm or deny the existence of Brady material in relation to the Leuci indictments - we must learn the true facts of Leuci's recantation so we can honestly and truthfully advise the court and defense relative to this issue.

More fundamentally, Det. Leuci's recantation requires that we immediately reappraise those indictments to determine whether we can proceed with the cases and vouch for Leuci's credibility to a petit jury. Leuci's new disclosures obviously may have an important bearing on the validity of the indictments and may influence the proper determination of motions directed to those indictments which are pending in state court. Moreover, the unresolved problem prohibits us from making state cases ready for trial. Our failure to move those indictments for trial may jeopardize the cases by exposing them to motions to dismiss for delay of prosecution.

As to prosecutorial function

Det. Leuci is also a principle witness in two outstanding sealed indictments obtained by the Special Prosecutor's Office. Those indictments should not be public nor should the prospective defendants be subjected to arrest if the disclosures of Detective Leuci will require dismissal of the cases. One of the defendants in fact has been actively sought since April 19, 1974. He may be located or surrender at any time and the problem will become an immediate dilemma.

In addition there are three other investigations involving Leuci pending before the Extraordinary Special Grand Jury in New York County. Leuci's testimony is crucial to the intelligent completion of those investigations. The presentations of those cases has already been delayed for two weeks as a result of the intransigence of the United States Attorney's Office.

Moreover, in each of these situations we must make decisions as to which witnesses will be granted immunity - making these decisions without the Leuci information is the equivalent of shooting in the dark.

As to Police Functions

Because of the extensive corruption in the New York City Police Department which was demonstrated during the Knapp Commission hearings, the Governor created the Office of the Special Prosecutor. As a result of that action the investigation and prosecution of all police corruption is solely within the jurisdiction of this agency.

It is apparent that Detective Leuci's recent revelations deal predominantly with corruption in the New York City Police Department. Corruption in any county or city governmental agency is, of course, of vital and predominant interest to this State. The responsibility to eliminate it by investigation, prosecution and more effective administration is almost exclusively the concern and function of the State. Occasionally, the Federal Government because of interstate ramifications may have some

jurisdiction in a state corruption case. Federal jurisdiction has also been recently stretched to charge corrupt city police officers for taking bribes by back door tax indictments. Obviously, in the nature of things, these tax prosecutions are appendages to the real crime-bribery-and are therefore not as crucial as the State corruption investigations.

Detective Leuci, moreover, is presently a state law enforcement officer, paid by the State of New York who has evidence of state crimes which he wants to divulge. It is outrageous that a federal prosecutor would intervene in such a situation by blocking state efforts to subpoena a voluntary state witness or by ordering a police officer not to disclose evidence of crime to state prosecutors.

In a court appearance before the Honorable Arnold Bauman on May 2, 1974 Paul Curran, United States Attorney for the Southern District of New York conceded that the Special Prosecutor had a right to question Detective Leuci. He stated that he would make Leuci available when he completed debriefing Leuci relative to his disclosures of misconduct. An article in the New York Times of May 3, 1974 quotes a Federal source who indicated the delay would be three weeks.

The United States Attorney's Office has already had the exclusive possession of Leuci for two weeks. I submit that any witness can be debriefed in a matter of days and that the United States Attorney has simply advanced a specious justification for their action.

The Special Prosecutor has at all times been willing to share Det. Leuci - we are not seeking exclusive access. I am sure that the United States Attorney cannot and will not assert that their "debriefing" operation is taking all day, everyday, seven days a week.

Mr. Curran in his court appearance advanced no other reason for his action. This weak "justification" indicates that

the United States Attorneys Office has displayed a reckless disregard for the sanctity of the State Criminal Justice System.

The Special Prosecutor's Office sought to avoid in every reasonable way the litigation it is currently engaged in. The cause of law enforcement cannot be aided by disputes between State and Federal prosecutorial agencies, such disputes can only benefit corrupt public officials. However, we were left with no alternative in light of the serious problems confronting us and the uncompromising attitude of the United States Attorney's Office.

The Special Prosecutor's Office has received a mandate from the Governor of New York State to investigate corruption in the Criminal Justice System. It is axiomatic that the Special Prosecutor's Office must set the example for all other prosecutorial agencies in the State in adhering to the highest principles of justice and fairness. It is therefore intolerable for this Office to continue the prosecution of cases whose validity is in doubt. Without access to Det. Leuci we cannot intelligibly evaluate the cases which are pending as a result of his testimony and we can no longer vouch for his credibility as a witness. Therefore, if the application of the Special Prosecutor is denied we will have no alternative but to move to dismiss all indictments pending before the various terms of the Extraordinary Special and Trial Terms of the State Supreme Court.

Federal Interference with State Function

Law enforcement agencies are occasionally passively non-cooperative with each other. They may decline to make their own witness or evidence available to another agency. The other agency may not be able to independently obtain jurisdiction over the witness or obtain the evidence.

That is not the situation presented here. The United States Attorney's Office has actively blocked and impeded the State's prosecutorial, judicial, and police function.

Detective Leuci is already a State witness in pending trials and current grand jury investigations. He has indicated that he wants to make full disclosure to the Special Prosecutor of his criminal activity.

The actions the United States Attorney has taken to interfere with the relationship of the State and its witness in order to prevent the Special Prosecutor from learning of Leuci's disclosures appear to violate Section 215.10 of the New York State Penal Law - Tampering with a witness. (See Memorandum of Law).

Detective Leuci is still a member of the New York City Police Department. He was in the jurisdiction approximately five days a week until April 18, 1974. He is still apparently in the jurisdiction on a daily basis.

The affirmative steps taken by the United States Attorney's Office to prevent Detective Leuci from being subpoenaed before a State Grand Jury appear to violate Section 195.05 of the New York State Penal Law-Obstruction of Governmental Administration. (See Memorandum of Law).

It should be noted that the Special Prosecutor's Office has not physically attempted to serve Leuci with subpoena. Such an attempt would be futile and could cause a potentially unseemly or dangerous confrontation between the Marshals and agents of this Office. Proceeding by way of an ORDER TO SHOW CAUSE is the more judicious approach.

United States Attorney Paul Curran was asked in Court to confirm or deny the allegations of fact of the Special Prosecutor. He declined to honor the request at that time. Since we do not know what the United States Attorney's position is on the facts of the case it is impossible to rationally anticipate his legal arguments and we decline to do so at this time. In the event that the United States Attorney's Office denies the factual allegation of the special prosecutor we request the court to direct an immediate hearing.

Wherefore your deponent respectfully requests that this Court direct the United States Attorney for the Southern District of New York and the Chief United States Marshal to produce Detective Robert Leuci before the Extraordinary Special Grand Jury in New York County and that they desist from interfering with and preventing the appearance of Detective Leuci before the Grand Jury.

Stephen J. Fallis

Sworn to before me
this 6th day of May 1974.

EXTRAORDINARY SPECIAL AND TRIAL TERM

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

— *against* —

Emmet Cusack, Chester Dorris

and John McElhearn

Defendant

AFFIDAVIT

MAURICE H. NADJARI

OFFICE OF THE SPECIAL STATE PROSECUTOR
2 WORLD TRADE CENTER
NEW YORK, NEW YORK 10047
(212) 466-1250

RWG:sk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPECIAL STATE PROSECUTOR OF THE STATE OF NEW YORK,

Plaintiff,

-v-

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, U. S. MARSHALS SERVICE,

Defendants.

AFFIDAVIT

74 Civ. 1912

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

PAUL J. CURRAN, being duly sworn, deposes and says:

1. I am the United States Attorney for the Southern District of New York. Except where otherwise stated, this affidavit is submitted on information and bel based in part on my personal knowledge, conversations with members of the staff of the United States Attorney's Office for the Southern District of New York and a review of the files and materials of this office. This affidavit is submitted in opposition to the application of New York State Deputy Attorney General Maurice H. Nadjari to compel the United States Government to produce Robert Leuci as a witness before a State Grand Jury.

2. Before detailing the reasons why the Government cannot make Detective Leuci immediately available to the Deputy Attorney General, I will correct two false impressions created by the affidavit of Stephen J. Fallis

GPO 1973 O - 474 479

RWG:sk

of the Deputy Attorney General's Office. First, the United States Attorney's Office for the Southern District of New York never refused to produce Detective Leuci or to turn over additional information supplied by him. Rather, my office informed Mr. Nadjari and members of his staff that Detective Leuci was being debriefed prior to testifying before Federal Grand Juries and for the additional purpose of assisting this office in the preparation of appropriate papers to satisfy our obligation in the pending motions before this Court in United States v. Edmund Rosner, 72 Cr. 782. Mr. Nadjari was told that "in due course" Leuci's additional information and Leuci himself would be made available. Second, contrary to the impression created by Fallis's affidavit, *the Government is not keeping Leuci in federal protective custody in order to suppress any of his disclosures. It was Assistants in my office and in the Eastern District who, after many weeks of discussions with Detective Leuci, obtained from Leuci admissions of crimes in addition to those admitted to at the Rosner trial. In fact, those admissions were obtained prior to Fallis's alleged conversation with Leuci and on April 23, 1974 this Court was informed of these disclosures by an in camera letter. During the last three weeks

*See paragraph 20 , supra and attached Exhibit K which makes it quite plain that members of Mr. Nadjari's staff are discussing and speculating about this pending proceeding in the press.

GPO : 1972 O - 474-419

RWG:sk

any, further investigation are the cases he now claims we are impeding even though none are scheduled for trial and others, although turned over some nine months ago, apparently have not as yet been presented to a Grand Jury.

4. In February 1974, the United States Attorneys' offices for the Southern and Eastern Districts of New York agreed to coordinate their investigations into the corrupt enforcement of the narcotics laws, with particular emphasis on the New York City Police Department's Special Investigation Unit (SIU). The Federal Drug Enforcement Administration (DEA), the Internal Revenue Service (IRS) and the New York City Police Department have all been cooperating in this continuing joint investigation which to date has resulted in eleven indictments involving thirteen former SIU detectives and others for various crimes including sale and facilitating the sale of heroin, obstruction of justice, and income tax evasion. That investigation is still actively proceeding and Federal Grand Juries in both Districts are at this time hearing additional evidence on these and related cases.

5. During the course of this investigation, specifically during March and early April, 1974, two of my Assistant United States Attorneys, Rudolph W. Giuliani, Chief of the Narcotics Unit, and Joseph Jaffe, Chief of the Official Corruption Unit, had a number of discussions with Detective Robert Leuci concerning whether he had been involved in criminal conduct in addition to those crimes

GPO : 1973 O - 474-479

RWG:sk

admitted at the Rosner trial. The discussions were motivated by evidence, or more accurately speculation based on evidence, developed during the course of Messrs. Giuliani and Jaffe's investigation of the SIU. During this period of time Detective Leuci was still being made available to Mr. Nadjari's office and had apparently discussed with some of his Assistants the "pressure" being put on him by my Assistants and Assistants in the Eastern District to disclose the truth about his involvement in crime. According to Detective Leuci he was told by Assistants in Mr. Nadjari's office that various Assistants in my office could not be trusted. Finally, on the evening of April 17, 1974, Detective Leuci admitted to Mr. Giuliani and to Assistant United States Attorney Thomas Puccio, Chief of the Criminal Division in the Eastern District, details of his involvement in criminal acts in addition to those disclosed at the Rosner trial. Since that time Assistant United States Attorneys, and DEA and IRS agents have been engaged in an effort to corroborate this information; evidence on these matters has already been presented to a Federal Grand Jury and more evidence is scheduled to be presented within the next two weeks.*

* Throughout this period Mr. Nadjari's office has actively attempted to obstruct these efforts to corroborate this information. It has been reported to me that the New York City Police Department was advised by Mr. Nadjari's office to refuse to comply with a Federal subpoena dated April 25, 1974 demanding production of evidence for a Federal Grand Jury necessary to corroborate some of this information. Wisely, the Police Department, as it has throughout this investigation, cooperated fully with the Federal Government and promptly delivered the subpoenaed documents.

GPO 1972 O - 474-478

RWG:sk

6. On April 19, 1974, at a meeting attended by myself, Chief Assistant United States Attorney Silvio J. Mollo, Maurice Nadjari, and his Chief Assistant Joseph Phillips, I informed Messrs. Nadjari and Phillips of the fact that Detective Leuci had made additional disclosures of criminal conduct and I told them that I would make this information available after the Federal Government had fulfilled its obligation to present this evidence in coherent form to the Court in the Rosner case and to Federal Grand Juries in both Districts. Apparently unsatisfied with this proposal, the Deputy State Attorney General without prior telephonic or other notice, served the United States Attorney's office at 1:08 P.M. on May 1, 1974, with an order requiring the United States Attorney and the Director of the United States Marshal's Service in this District to show cause at 10:00 A.M. May 2, 1974, why they should not be required to produce Robert Leuci. The papers served were unaccompanied by a Memorandum of Law or citation to any authority suggesting the slightest support for the motion. More importantly, rather than maintaining the confidentiality of these sensitive investigative matters by submitting his papers in camera, Mr. Nadjari released them to the press. His unnecessary and unwise action in this regard is the sole cause of the undesirable publicity that has attended these unfortunate proceedings -- publicity which can only hinder the cause of justice in these matters.

GPO 1973 O - 474-470

THE NEW YORK TIMES, SUNDAY, AUGUST 19, 1973

RWG:sk

II. THE REASONS THE GOVERNMENT CANNOT MAKE DETECTIVE LEUCI IMMEDIATELY AVAILABLE TO MADJARI

7. Detective Robert Leuci is presently in Federal protective custody pursuant to the Organized Crime Control Act of 1970, Title V §§ 501-504, Pub. L. 91-452, 84 Stat. 922, 933 (October 15, 1970), Title 18, United States Code, Chapter 223 (immediately preceeding §3481). As such, a State has no power to require his presence. Moreover, a New York statute, N.Y. Crim. Proc. L § 650.30, provides a procedure for requesting production of witnesses in federal custody, a procedure the Deputy State Attorney General has chosen to ignore. That statute clearly recognizes that the Federal Government cannot be compelled to produce a witness in its custody. However, the United States Attorney's Office, realizing its obligation and responsibility, is not standing on its right to withhold Leuci, but has agreed to produce him after it has completed the Federal Grand Jury investigation and fulfilled its obligation with regard to the Rosner case. There are two main reasons the Government must insist on its right to withhold Leuci during this sensitive period within which it is critical that this information remain confidential. The first is the simple practical problem, recognized as an established rule of comity between responsible law enforcement agencies, that when an informant-witness is being debriefed only one agency will conduct the debriefing and thereafter disseminate the intelligence to other interested agencies. The second reason involves the

GPO 1972 O - 474-470

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substantial risk of public disclosure presented and the attendant consequences of that disclosure to Detective Leuci and the pending investigation, if we are forced to give this information to Mr. Nadjari before we have completed a thorough Grand Jury investigation. Such a charge and the documentation of that charge is most unfortunate for the entire law enforcement community, but it was the New York Deputy Attorney General, not the United States Attorney, who chose to air this dispute publicly when it could have been done in camera.

8. The Deputy Attorney General has apparently decided to use publicity as an investigative tool. See, Exhibit A; "Closing In On Who And How," New York Sunday Times, News of the Week in Review, August 19, 1973, p.5, col. 4. Mr. Nadjari's course of conduct in the past has included the public announcement that he has solved a case followed by a prediction of when he expects to indict. Compounding this conduct, soon after such pronouncements there are "leaks" by his press secretary or by other "sources" in his office disclosing the names of those he considers to have committed the crime and the names of cooperating witnesses. Such past conduct is relevant to our refusal to disclose at this time because: (1) it raises the clear danger that any information disclosed to Mr. Nadjari will be in turn disclosed by him or by his press secretary to the news media; (2) it discourages witnesses from cooperating for fear that their cooperation will be prematurely disclosed in the press; and (3) it

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might prejudice the defendant's right to a fair trial and, consequently, jeopardize the eventual success of these very important Federal prosecutions.

III. NADJARI'S HISTORY OF DISCLOSURES TO THE PRESS ON THE PROPERTY CLERK'S INVESTIGATION

9. The Deputy State Attorney General's actions with regard to disclosures to the press involve many different investigations but for purposes of the instant motion the most relevant to examine are his public comments and his office's leaks with regard to his seventeen month investigation of the heroin stolen from the New York City Police Department Property Clerk's office.

10. On August 14, 1973, at a press conference called for the ostensible purpose of announcing the criminal contempt indictment of Vincent Papa, a defendant under indictment in this Court for far more serious criminal activity, Mr. Nadjari announced that he had solved the theft of the "Property Clerk" drugs, knew exactly how it was done and by whom, and that indictments would be forthcoming as soon as sufficient evidence was amassed. See Exhibit B, New York Times, August 15, 1973, p. 1, Col. 5.

11. The following day, on August 16, 1973, citing unnamed law enforcement officials as its source, the New York Times revealed numerous details of the alleged theft, including that it had been consummated by New York City police officers acting in concert with members of

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organized crime; the number of police officers involved; their rank; and other material facts which would aid any knowledgeable reader in determining the identity of the suspects. Exhibit C; New York Times, August 16, 1973, p.72, col. 1.

12. On October 14, 1973, speaking on WABC's "Radio Press Conference" and WNBC-TV's "Here and Now," Mr. Nadjari stated that indictments would be forthcoming within "'a couple of months on the outside'". When questioned regarding widespread complaints about the slowness of his at that time ten month old Property Clerk's investigation, Nadjari conceded that the United States Attorney was possibly interested in the case and "snapped" "'if I can't do anything with [the case], nobody can do anything with it.'" Exhibit D; New York Times, October 15, 1973, p. 41, col. 1.

13. On December 16, 1973, the New York Times reported that Mr. Nadjari's investigation had focused on two police officers, a lieutenant and one of his detectives who had retired during the preceeding year and who had shortly thereafter been hired as bodyguards for Vincent Papa's two sons. These revelations were attributed to law enforcement sources and a "highly placed official source." Exhibit E; New York Sunday Times, Section I, December 16, 1973, p. 42B, col. 1.

14. On February 20, 1974, "sources in the office of Mr. Nadjari" made it known that two police officers,

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including Lieutenant Julia Tucker, had been assisting them in their investigation and that Lieutenant Tucker had already testified before the grand jury on several occasions. According to these sources, Lieutenant Tucker and the other officer had agreed to testify only after being implicated in the corruption that allegedly pervaded the New York City Police Department's now defunct SIU, between 1968 and 1971. Exhibit F; New York Times, February 20, 1974, p. 1, col. 2.

15. On February 21, 1974, the New York Times published a denial by Lieutenant Tucker that she had provided material information to Mr. Nadjari's grand jury. Acknowledging that she had appeared, Lieutenant Tucker stated that she had not testified about SIU corruption because she lacked factual knowledge of such corruption and had never been involved in any such incidents herself. Exhibit G; New York Times, February 21, 1974, p. 37, col. 1.

16. During the week preceeding February 23, 1974, Joseph A. Phillips, Mr. Nadjari's chief assistant, held a press conference to announce the perjury indictment of John Egan, a former SIU Lieutenant. At this conference Phillips alleged that an unidentified, and most importantly unindicted, detective had been the "principal brain" behind the narcotics thefts from the property clerk's office. Phillips charged this unnamed and as yet unindicted detective with being the kingpin of corruption in the Police

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Department at that time. Then, Mr. Phillips revealed a clue as to this detective's identity by disclosing that he had retired from the Police Department shortly after the apparent suicide of another detective, Joseph Nunziata. On February 23, 1974, law enforcement authorities were reported as stating that Mr. Nadjari was focusing on Frank King, a former SIU detective as the possible mastermind of the thefts. These same authorities stated however, that they still required more evidence before they could present the case against King to a grand jury. It should be noted that Detective King did in fact retire from the Police Department shortly after Detective Nunziata committed suicide. Exhibit H; New York Times, February 23, 1974, p. 1, col. 2.

17. On February 25, 1974, further disclosures attributed to several law enforcement sources regarding King were reported, including the allegation that King and another detective, Lieutenant Pasquale C. Intrieri, had been hired by Vincent Papa as a bodyguard for the latter's children. Exhibit I; New York Times, February 25, p. 31, col. 1.

18. Almost seventeen months have gone by since Mr. Nadjari began this investigation, almost nine months have elapsed since Mr. Nadjari first announced that he had solved the drug thefts and almost seven months have elapsed since he publicly stated that indictments would be forthcoming within "a couple of months on the outside."

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Meanwhile, no indictments have issued. This, however, has not deterred Mr. Nadjari, contrary to all standards of prosecutorial responsibility, from publicly identifying his primary target, and a possible informer, as well as a variety of factual details.

19. The Deputy State Attorney General's continual attempts to suggest the names of unindicted suspects by giving identifying data to the media and his office's leaking names of suspects and cooperating witnesses to the press, as documented in one situation in the attached exhibits, is a violation of the A.B.A's Canons of Professional Ethics, Canon 20 and Disciplinary Rule 7-107(A) and the A.B.A.'s Standards Relating to Fair Trial and Free Press. See Rule 8(a) of the Criminal Rules of the United States District Court for the Southern District of New York. The information which has been disclosed by Detective Leuci is extremely sensitive in the sense that it involves evidence of federal crimes which must be, and presently is being, presented to Federal Grand Juries in an orderly, professional, and confidential manner. Moreover, that information is relevant to the Rosner motions pending before this Court and will, as soon as it has been fully developed and disclosed to a Grand Jury, be revealed to counsel in the Rosner case. These two very substantial considerations are of prime concern to the Federal Government and given the danger of disclosure the Government

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would risk and the failure of the Deputy State Attorney General to present any real immediate need for the witness, the Government's position is not only reasonable but the only way in which the Government can protect the confidentiality of this evidence, the integrity of this investigation, and the orderly development of these inquiries.

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IV. PRESS COMMENTS WITH REGARD TO THIS PROCEEDING.

20. If there is any doubt in the Court's mind as to the substantial, and in fact, overwhelming, risk of public disclosure presented by Mr. Nadjari's use of the press, an examination of the manner in which he has handled this very motion will remove that doubt. As I stated in oral argument, this entire incident is most unfortunate and the undue publicity it has received is even more unfortunate. However all of that could have been avoided if the Deputy Attorney General were more interested in the relief he seeks than in obtaining publicity for himself. This order to show cause could have been filed and served in camera and then our response would similarly have been under seal. Further, after ignoring that rather obvious protection, Mr. Nadjari's office could have at least refrained from commenting on this motion in the press. The New York Times article of May 2, 1974 graphically illustrates the different positions of the two prosecutor's office's vis a vis the press. Exhibits J; New York Times, May 2, 1974, p. 51, col.1. The only comment from the United States Attorney's office was the usual "no comment" required whenever a matter is sub judice. On the other hand, the article quotes "sources in Mr. Nadjari's office" as speculating, in fact incorrectly, as to the reasons why Detective Leuci made additional disclosures. The very next day the same, or

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other "sources in Mr. Nadjari's office" continued their loose speculation in the press concerning the proceeding pending before this Court, a clear violation of Rule 8(a) of the Criminal Rules of the Southern District of New York. Moreover, this same May 3 article contained a report that the Government "wishes to keep Detective Leuci from saying anything that could upset the conviction [in the Rosner case]," a report that this Court knows is completely false.

V. THE SUCCESS OF THE FEDERAL JOINT INVESTIGATION.

21. The United States Attorney's office has traditionally, and certainly has throughout the time I have been in office, done everything possible to cooperate fully with all responsible law enforcement authorities, Federal and local. In fact the joint investigation by the United States Attorney's offices in the Southern and Eastern Districts of New York, which has resulted in so many significant indictments, is the direct result of cooperative efforts involving two United States Attorneys offices, D.E.A. I.R.S. and the New York City Police Department all working toward a common objective, securing indictments of those who have violated the law, and not wasting effort on leaking information to the press. It is significant to note that in seventeen months of investigating the SIU, Mr. Nadjari's office has had only two indictments and in a mere two months our joint investigation, which is still continuing, has resulted in some thirteen indictments involving serious criminal activity, including the sale of heroin by some

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Detectives* all of this done without holding press conferences where we identified suspects prior to indictments, predicted results or played numbers games in the press. My office has in fact in the past referred to Mr. Nadjari in completed fashion numerous cases including his very first indictment. The investigation he discusses in his moving papers merely involves presentation to a State Grand Jury of cases investigated and developed by Federal agents and Assistants in my office, cases presented to Mr. Nadjari in completed form some ten months ago.

VI. NADJARI'S CLAIM OF IRREPARABLE HARM

22. The Court should also examine carefully the veracity of the State Prosecutor's claim that he needs this information immediately and that a reasonable delay will irreparably damage his investigation. The cases he cites as being impeded by this delay are not even, as yet, scheduled for trial and cannot in any way be irreparably jeopardized. His claim that these indictments must be dismissed is absurd. Similarly, his claim that his Grand Jury investigation will be irreparably injured by this delay is plainly specious. That investigation involves putting before a State Grand Jury evidence which has been in Mr. Nadjari's possession for some ten months, evidence

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* Both individuals Mr. Nadjari has identified as non-police personnel allegedly involved in the Property Clerk's theft, Joseph DiNapoli and Vincent Papa, have been indicted by my office on violations of the Federal Narcotics Laws. Joseph DiNapoli has already been convicted, and Vincent Papa is pending for trial.

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presented to him by our office in the form of tape recordings. A delay for some reasonable period can not possibly irreparably damage Mr. Nadjari's investigation. On the other hand, forcing the Government to produce Detective Leuci will, given Mr. Nadjari's history of public disclosure and leaks to the press raise a serious risk that a federal investigation that has to date proceeded confidentially, except of course for proper announcements of indictments, would be seriously obstructed and irreparably damaged.

VII. CONCLUSION

23. Once again, I must emphasize that this public dispute between two law enforcement agencies is deplorable. It has occurred only because Mr. Nadjari, apparently fearful that some other prosecutor's office might solve the case he announced he solved nine months age, has failed to honor an unwritten rule of comity between responsible law enforcement agencies, that is, that they will not interfere and meddle in the sensitive relations between a law enforcement agency and an informant-witness. Not only has Mr. Nadjari violated that principle, but by failing to proceed in camera he is the sole cause of the unfortunate publicity surrounding this dispute. The facts put forth in this affidavit are only those strictly required to establish beyond any doubt the reasonableness and rationale for my decision to withold Detective Leuci. An examination

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of these facts and the public record supporting these facts fully justifies this decision. However, there were and are other facts of an even more sensitive and more prejudicial nature which are relevant to that decision and those facts should be made known to the Court, but would serve no purpose if revealed publicly except to embarrass Mr. Nadjari and his office. Thus, accompanying this affidavit, is a sealed affidavit setting forth these additional facts which when considered together with the evidence set forth herein made it, and make it, imperative that the Federal Government not produce any of its witnesses or disclose any of its evidence in this investigation until the Federal Grand Jury has completed its investigation.

WHEREFORE, for the reasons stated in this affidavit, the accompanying sealed affidavit and Memorandum of Law, the Government respectfully requests that the Court deny, in all respects, the plaintiff's motion.

Paul J. Curran

PAUL J. CURRAN

Sworn to before me this

5th day of May, 1974.

JOSEPH JAFFE
Notary Public, State of New York
No. 31-2766625
Qualified in New York County
Commission Expires March 30, 1975

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Police Drug Theft

Closing In On Who And How

It was quite probably the most spectacular crime in the history of New York City—the brazen theft of more than $70-million worth of confiscated narcotics entrusted to the custody of the New York Police Department. And it became all the more outrageous because the 398 pounds of heroin and cocaine pilfered from the police storerooms included the seizures made in the celebrated "French Connection" case, which was embroidered into an Academy Award winning movie.

Since the first disclosures of the thefts last December, a task force of 60 to 100 policemen and investigators from the office of Maurice H. Nadjari, the state's special anti-corruption prosecutor, has worked to break the case.

Last week, the first cracks appeared when Mr. Nadjari asserted that the investigators now knew who had stolen the narcotics and how they had done it. Among them, said Mr. Nadjari, "were police officers working the streets."

Yet the dramatic revelation was in itself inconclusive. Mr. Nadjari refused to name the conspirators, saying that it was premature. He admitted that no one had yet been indicted, or even arrested, for the actual thefts.

Rather, Mr. Nadjari made his disclosures in the course of announcing the eight-count indictment for criminal contempt of a convicted narcotics peddler, Vincent Papa, for refusing to answer questions about his involvement in the thefts before a special grand jury. Papa, who is serving up to five years in the Atlanta Federal penitentiary for narcotics and income tax violations, was discovered with nearly $1-million in cash stuffed inside a suitcase when narcotics agents picked him up on Feb. 4, 1972. It was not until more than a year later that investigators decided the money was earmarked for narcotics stolen from the police vaults.

The disclosure inevitably prompted speculation as to why Mr. Nadjari, a seasoned criminal prosecutor, had made his tantalizing assertion without any indictments to back it up. Some observers surmised that it might be a ploy to panic suspects into revealing information to bring about their own indictments.

Another explanation came from Mr. Nadjari's associates, who explained that Papa's refusal to talk about the case produced his inevitable indictments for criminal contempt, which Mr. Nadjari was bound to disclose to newsmen. The progress report served to put Papa's indictment in proper context.

No details have yet emerged about how the thefts were so successfully carried out. They reportedly involved a half-dozen major withdrawals between 1969 and 1972 by police conspirators who in turn marketed the drugs to underworld accomplices. The narcotics have since disappeared on the street. Law enforcement officials indicated that seven city policemen, possibly ranking as high as captain, were under suspicion in the case.

"It's one problem to know and another problem to prove," Mr. Nadjari said, but he added, "We're constantly picking up new evidence!"

—CHRISTOPHER S. WREN

NARCOTICS THEFT REPORTED SOLVED

Nadjari Says More Proof Is Awaited for Arrests in Police Loss of Drugs

By CHRISTOPHER S. WREN

Maurice H. Nadjari, the special state prosecutor, said yesterday that authorities investigating the theft of more than $70-million worth of narcotics from Police Department custody now "know exactly how it was done and who did it" but had not yet gathered enough evidence for arrests.

He indicated that the "well-staged conspiracy" included an undisclosed number of police officers below the rank of inspector, some still on duty.

The disclosure came as Mr. Nadjari announced the indictment of Vincent C. Papa, who has been described as a key narcotics dealer, on eight counts of first-degree criminal contempt for having refused to answer questions before a special grand jury in Manhattan that has been looking into police complicity in the case.

Papa indictment was the

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first in connection with the case since the first theft of 57 pounds of heroin from the celebrated "French Connection" case was disclosed by former Police Commissioner Patrick V. Murphy eight months ago.

Papa, 56 years old, is serving up to five years in the Federal penitentiary in Atlanta for narcotics and income-tax violations. Before his conviction he had lived at 21-34 37th Street in the Astoria section of Queens.

Suitcase Filled With Cash

When Papa, who has been linked to organized crime, was arrested on Feb. 4, 1972, in the Bronx, narcotics agents found a green suitcase with $968,550 in cash on the back seat of his car.

Investigators now believe that the money, much of it in crisp $100 bills, was earmarked for the purchase of more than 100 pounds of heroin and cocaine held as evidence in police vaults.

A subsequent inventory has disclosed that more than 395 pounds of narcotics—more than 261 pounds of heroin and more than 137 pounds of cocaine—had been stolen between 1969 and 1972.

"It went out in a number of large transactions," Mr. Nadjari said, "not pound by pound."

He indicated that the stolen narcotics were "probably on the market or have been sold on the market" and could not be recovered.

The narcotics had a street value of between $70-million and $80-million dollars, according to Deputy Inspector Joseph Comperiati, who has headed the Police Department's internal investigation.

Conspiracy Discovered

Inspector Comperiati, who was present when Mr. Nadjari made his announcement, said that an investigation by a full-time task force of up to 70 men had uncovered "a very close-knit conspiracy involving a number of police officers and organized crime figures."

Mr. Nadjari repeatedly insisted that "I am not going to comment on who the suspects may or may not be" but he said that "there is very little question this was exceedingly well planned and a good number of them were on the inside as well as the outside."

He dated the initial alleged conspiracy back before the first thefts in 1969, but would give no details about how the thefts had been carried out.

"We know that a number of police officers were involved in the theft," Mr. Nadjari said, describing them only as low-ranking. "We know who they were and how they did it. Now we have to prove it.

"It's one problem to know and another problem to prove. We're constantly picking up new evidence."

Colleagues of Mr. Nadjari called the case "a painstaking old-fashioned detective sort of investigation" that had been started after the first disclosures of the thefts last December.

They said the linking of the missing narcotics to the nearly $1-million confiscated from Papa was "accidental." The money is now in Federal custody.

"Those pieces were not put together as pieces of one case," Mr. Nadjari said.

He refused to predict when further indictments would be announced, but, with Deputy Inspector Comperiati gave every indication of expecting them eventually.

"The investigation is continuing," Mr. Nadjari said. "When sufficient evidence is accumulated indictments will come down."

At the Police Department Deputy Commissioner Richard Kellerman declined any comment on whether police officers were under suspicion or had been transferred in connection with the thefts.

8 Answers Refused

Papa has been held at the Manhattan House of Detention since the latter part of last month.

On July 31 and again last Thursday he appeared before the grand jury and refused to answer at least eight questions about his prior narcotics dealings.

Among them, he was asked, "isn't it a fact that you had a number of narcotics transaction with police officers of the City of New York?"

Another question put to him was:

"Isn't it also a fact that you had close to a million dollars in your possession of Feb. 4, 1972, in order to pay for more than 100 pounds of heroin and cocaine, which is taken from the City of New York Property Clerk's Office?"

Yesterday, shortly after 2:30 P.M., Papa was booked on the contempt charges at the First Precinct on Ericsson Place. As he was ushered in, wearing olive drab prison fatigues, he covered his face with his hands.

Papa would not answer questions, but asked for a drink of water when he emerged from the booking in the back room. He also requested an ambulance, saying he was ill, but refused it after one arrived.

The narcotics thefts attracted particular attention because they included heroin confiscated in one spectacular case in 1962. The narcotics had been held because the case, which involved French nationals as well as Americans, was never officially closed. A fictionalized version of the case was made into a film, "The French Connection," which won the Academy Award as best picture last year.

7 IN POLICE LINKED WITH DRUG THEFTS

All Suspected of Scheming With Organized Crime to Steal Seized Narcotics

By CHRISTOPHER S. WREN

Seven New York City policemen holding ranks up to captain are suspected of having conspired with organized crime figures to steal more than $70-million worth of confiscated narcotics from police custody, law-enforcement officials said yesterday.

Their alleged involvement in the thefts was discovered only following their transfers in a mass departmental shake-up within the last six months, according to one source. The men, who were described as "guys who knew their way around the property clerk's office," reportedly include both uniformed officers and detectives.

Some police officers have already been called before a Manhattan special grand jury that is investigating the narcotics thefts, according to the source, who did not say whether they had testified.

A number of underworld figures suspected of complicity in the conspiracy are expected to be summoned before the grand jury before the end of the month.

Indictment First in Case

Maurice H. Nadjari, the special state prosecutor, said on Tuesday that authorities knew who had committed the thefts. He made the assertion while announcing that the grand jury had indicted Vincent C. Papa, a convicted narcotics dealer, on eight counts of first-degree criminal contempt for having refused to answer questions as to whether he was involved in the conspiracy.

His indictment was the first in connection with the case. The thefts were first disclosed by former Police Commissioner Patrick V. Murphy last December.

Papa, who is serving up to five years in the Atlanta Federal penitentiary for narcotics and income tax violations, was arrested by narcotics agents on Feb. 4, 1972, in the Bronx. When he was arrested, $968,550 in cash was found in his possession.

Early last June, after what was described as "a lot of hard work," investigators determined that the money had been earmarked for the stolen narcotics.

On Aug 9, Papa refused to answer questions about any alleged narcotics dealings with Louis Cirillo, Virgil Alessa and Vincent De Napoli. All three were described by a law enforcement official yesterday as under "close scrutiny" in the case.

6 Thefts Reported

The thefts, which occurred between 1969 and 1972, are said to have involved six substantial withdrawals of contraband heroin and cocaine, which were then marketed almost immediately through underworld channels.

The 398 pounds of stolen narcotics were described yesterday by a law enforcement official as now "in the arms of kids all over the city." The narcotics had an estimated street value of $70-million to $80-million.

"This is one of the most sophisticated crimes ever pulled off," the official said. "It is much more sophisticated than Watergate. These guys were professionals. Those were amateurs."

On Tuesday, Deputy Inspector Joseph Comperiati, who has headed the Police Department's own investigation, said that the "close-knit conspiracy" involved both a number of policemen and organized crime figures.

Mr. Nadjari was out of town yesterday and could not be reached for comment. William Federici, his director of special projects, reiterated Mr. Nadjari's statement Tuesday that he could not go beyond the scope of the announced indictments. A spokesman for the Police Department also declined to comment on the case.

Computer Used

Since the thefts were first uncovered eight months ago, a joint task force from the Police Department and Mr. Nadjari's office has used a whole range of investigative techniques, including a computer, to sift through information.

The task force, which comprised 60 to 100 hand-picked men, is headed by Deputy Inspector Comperiati and Walter Stone, Mr. Nadjari's assistant chief investigator.

"The entire police administration has been most cooperative and has worked just as hard as we have in solving this crime," Mr. Federici said. "There is nobody standing in the way."

No arrests have yet been made in connection with the alleged conspiracy and it is still not known when indictments relating to the specific thefts can be expected from the grand jury.

"When sufficient evidence is accumulated," Mr. Nadjari promised on Tuesday, "indictments will come down."

Nadjari Sees More Judges And Police Being Indicted

Says That Judicial Graft Is Focus of 200 Inquiries, but That 'Less Than 10' Officers Took Part in Drug Theft

By LAURIE JOHNSTON

Further indictments of judges here "will be forthcoming" and indictments of police officers for stealing $70-million worth of narcotics from Police Department custody can be expected within "a couple of months on the outside," Maurice H. Nadjari, the special state prosecutor, said yesterday.

Mr. Nadjari, whose office obtained the indictment of Civil Court Judge Ross J. DiLorenzo in August for perjury, said that "graft and payoffs to judges" were involved currently in some of the "over 200 hundred investigations that may mature into indictments—multiple indictments." But he declined to "get into the numbers game" in relation to judges.

"There are many investigations into the judiciary at this moment," he said. "If one-tenth of them mature into indictments, there would be quite an impact on the community."

'No Higher Than Captain'

On the narcotics theft, Mr. Nadjari said, for the first time publicly, that "less than 10" policemen had planned it "and then solicited the underworld for aid" in selling the 400 pounds of heroin and cocaine, including 57 pounds of heroin from the "French Connection" case.

"We believe that a number of police officers actually went to the police property clerk's office and by forging a number of documents were able to remove the drugs," he said.

The prosecutor, who was appointed 13 months ago by Governor Rockefeller to investigate corruption in the city's criminal-justice system, said that "we still lack sufficient proof" to get a grand-jury indictment of police officers involved in the narcotics theft. He described them as "no higher than captain and a few detectives."

"A great deal is new," he said. "We are a great deal closer than we were a few weeks ago." The thefts, announced in early 1972, took place between 1969 and 1972 and included heroin confiscated in a case that involved French nationals as well as Americans and that was later made into a movie.

Mr. Nadjari's remarks were made on the WABC "Radio Press Conference" program and WNBC-TV's "Here and Now" program.

Reminded of widespread complaints about the slowness of the narcotics-theft investigation, Mr. Nadjari conceded that the United States Attorney "perhaps also has an interest" in the case.

"If I can't do anything with it, nobody can do anything with it," he snapped.

The extent of official corruption in New York City, from the police through the judiciary, "was perhaps even worse than I expected," Mr. Nadjari said.

"Even as a cynic, I'm somewhat shocked," he said. "The entire criminal-justice system is tainted and perhaps it's by reason of the way it is created," largely through "the powers of the prevailing political party."

Corruption in the Police Department is still "rather widespread," Mr. Nadjari asserted, adding that "there's a new breed within law enforcement who have made some good impacts."

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2 Ex-Officers Linked to Theft of Drugs From Police

By EMANUEL PERLMUTTER

Two retired officers—a police lieutenant and one of his detectives—have become the prime suspects in the investigation of the theft of $70-million in narcotics from Police Headquarters, law enforcement sources said yesterday.

The narcotics were believed to have been taken between 1969 and 1972 by Police conspirators who sold them to underworld dealers.

The two officers under investigation retired last year and were hired soon after they left the force as bodyguards for the two sons of Vincent C. Papa, an underworld leader in the illegal traffic in narcotics, according to the sources. The sons, Vincent Jr. and Victor, were reported to have been the targets of kidnapping by rival mobsters.

The identity of the two former officers, who are among several police suspects, has not been disclosed. But a highly placed official source said yesterday that they were the key figures in the case that the special state prosecutor, Maurice H. Nadjari, has been completing "piece by piece."

The theft of the 30$ pounds of heroin and cocaine from the storage rooms of the police property clerk was disclosed in December, 1972.

Some of the stolen heroin had been seized by the police in 1962, in a raid that became known as the "French Connection" case, the story of which ultimately was made into a motion picture.

Last August, Mr. Nadjari had announced that the thefts had been a "well-staged conspiracy" that had included police officers. But he did not identify any of the police suspects.

Mr. Nadjari made his announcement of police complicity in disclosing the indictment of Mr. Papa for refusing to answer questions before a special grand jury about his alleged involvement in the thefts.

Mr. Papa is serving a five-year sentence in the Federal penitentiary at Atlanta for narcotics and income-tax violations. He was found to have nearly $1-million cash in a suitcase when narcotics agents arrested him in February, 1972.

The alleged involvement of the retired lieutenant and detective is believed to have been leaked to Mr. Nadjari's investigators by low-echelon underworld members who have been cooperating with the inquiry.

The two key police suspects are believed to have revealed to Mr. Papa several years ago that he was the object of a wiretap. This disclosure hampered an investigation that had been gathering information against him. The two officers were said to have been part of the wiretap team.

Some underworld suspects have been balking at questioning before the special grand jury and are expected to be indicted soon for contempt.

2 Officers Say Bribery Pervaded Narcotics Unit

By DAVID BURNHAM

Two New York police officers have given evidence showing that at least half of the detectives assigned to the elite unit charged with arresting major heroin dealers here were accepting large cash bribes between 1968 and 1971, law enforcement sources said yesterday.

The two officers, one a ranking commander, reportedly have been assisting the office of Deputy Attorney General Maurice H. Nadjari in an intensive investigation of the special investigating unit, which began with the discovery in late 1972 of the theft of millions of dollars worth of heroin and cocaine from the police property clerk's office.

Two Allegedly Implicated

According to sources in the office of Mr. Nadjari, however, the two officers have provided leads and other information that strongly indicate a pattern of corruption far more pervasive than a single conspiracy to smuggle narcotics out of the department for resale on the streets of the city.

The two officers reportedly agreed to testify about the bribery within the investigating unit after they had been implicated in some of the schemes, according to sources in the office of Mr. Nadjari.

The investigation centers on at least a half dozen detectives the testimony has linked to alleged bribes of as much as $50,000, the sources said.

The bribes reportedly were paid by heroin dealers for such favors as avoiding arrest, the shading of critical testimony before grand juries and during trials, and for information about secret wiretaps.

One of the officers reportedly cooperating with a special grand jury empaneled by Mr. Nadjari in Manhattan is Lieut. Julia Tucker, whose transfer last year from the position as head of the sex-crime analysis squad prompted protests by

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2 POLICEMEN LINK BRIBES TO HEROIN

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several feminist organizations.

Lieutenant Tucker, who served with the narcotics division's special investigating unit from February, 1967, to November, 1969, was said to have already testified before the special grand jury several times.

At the time Lieutenant Tucker was removed as the head of the Sex-crime unit last November, former Police Commissioner Donald F. Cawley said the reassignment was a move that would prepare her for future promotion.

During the period in question, the special investigating unit had a peak strength of about 70 officers including six sergeants, a lieutenant and a captain. The unit's stated mission was to gather evidence against and arrest major heroin dealers.

Last week, the second in command of the unit during the years in question Lieut. John Egan, was indicted for perjury by the grand jury investigating the theft of the 398 pounds of heroin and cocaine, much of which was initially seized during the so-called "French Connection" case.

The specific charge against Lieutenant Egan was his denial to the grand jury that he knew anything about the payment of a bribe of $5,000 to $15,000 by a major heroin dealer for information about the wiretap that had been placed on the dealer's home.

The indictment also said the grand jury was investigating whether "the bribe in relation to the wiretap was the first in a series of bribes which ultimately effectuated the illegal removal of narcotics from the New York City Police Department Property Clerk's office."

A number of other officers associated with the investigating unit also have been implicated during the last year or two. Detective Joseph N. Nunziata apparently committed suicide in March, 1972, after being told he was under investigation by Federal authorities. Richard Bell, another former detective, on Nov. 8, 1973, was sentenced to 18 years in prison for burglary, criminal possession of dangerous drugs and attempted grand larceny.

Vincent Albano, also a former detective in the investigating unit, was forced out of the department in 1971 after he refused to answer questions before a grand jury investigating why he was shot six times as he left a Bronx grand jury with the court minutes of a heroin dealer named Salvatore Tommasetti.

EXHIBIT G

THE NEW YORK TIMES, THURSDAY, FEBRUARY 21, 1974

Drug Charge Laid to Aide Of Narcotics Prosecutor

Leff Is Accused of Giving a 'Dangerous Depressant' to Two in City Office—Lieutenant Explains Witness Role

By DAVID BURNHAM

An assistant district attorney in the office of the city's special narcotics prosecutor has been indicted for allegedly giving small quantities of the drug Quaalude to two other staff members of the office.

The city's special narcotics prosecutor, Frank J. Rogers, announced yesterday that the assistant district attorney, Richard Leff, 26 years old, had been indicted on charges of giving a small amount of the drug to Michael Beloff, a law assistant, and one tablet to Michael Richman, an assistant district attorney.

Mr. Rogers described Quaalude as a "dangerous depressant" and made available a report that quoted the Police Department as saying the drug was responsible for the death of approximately a dozen persons a year in the city.

Jury Appearance

In a second development, Lieut. Julia Tucker, the former commander of the Police Department's sex-crime analysis squad, protested published news accounts that she had provided information to a special grand jury investigating corruption within the special police unit responsible for arresting major heroin dealers.

Acknowledging that she had appeared before the grand jury empaneled by Deputy Attorney General Maurice H. Nadjari, Lieutenant Tucker said she had been unable to testify about alleged payoffs in the Special Investigating Unit "because I had no facts to give and I was never involved in such things myself."

The lieutenant, whose removal as head of the sex-crime squad prompted protests among several feminist organizations, added: "I wouldn't be screaming so loud if I were guilty."

In response to a question, Lieutenant Tucker said that on the advice of a lawyer from the Lieutenants Benevolent Association, she had requested, and received, a grant of immunity from prosecution before she testified.

"I [illegible]n't feel I needed the imm[illegible] but was advised I sho[illegible] request it," she said.

Mr. Rogers made the announcement about the indictment of Mr. Leff in the office his agency occupies in Room 737 at 26 Federal Plaza, in downtown Manhattan, the same office where the transfer of the drug was alleged to have taken place.

Mr. Rogers said that Mr. Leff had been indicted on two counts of the criminal sale of a "controlled substance" in the sixth degree, a Class D felony carrying a maximum penalty of seven years in prison. He said the two men who allegedly received the drug had been discharged several months ago.

Mr. Leff, who lives at 84-20 153d Avenue, Howard Beach, Queens, joined the office in September, 1973, after serving as an assistant to former District Attorney Frank S. Hogan. He is married and the father of two children.

He pleaded not guilty in Supreme Court before Justice Abraham I. Kahna and was released pending a preliminary hearing on March 6.

Inquiry Into Stolen Heroin Focuses on Ex-Detective

By DAVID BURNHAM

Investigators for the state's special anticorruption prosecutor, Maurice H. Nadjari, are focusing on Frank King, a 39-year-old former narcotics detective, as the possible master-mind behind the theft of millions of dollars worth of heroin and cocaine from the Police Department property clerk's office, law enforcement sources said yesterday.

Mr. King, who resigned from the Police Department on April 3, 1972, had been assigned to the Special Investigating Unit, the elite unit which in theory concentrated on arresting major heroin dealers.

The authorities said they needed more evidence before presenting the case against Mr. King to a grand jury. Mr. King could not be reached by telephone last night.

In a copyright article in The Daily News, Mr. King acknowledged that he was the chief target of the investigators but denied having anything to do with the theft.

The theft of the 398 pounds of narcotics, worth at least $70-million dollars, was described by Police Commissioner Patrick V. Murphy as the "single worst instance of police corruption" when he announced the theft in December, 1972.

Much of the narcotics stolen from the property clerk's office

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—presumably for re-sale on the streets of New York—originally had been seized during the case upon which the film "The French Connection" was based.

Earlier this week, other law-enforcement sources said that two policemen formerly assigned to the special narcotics unit had provided information to a grand jury showing that more than half of the detectives in this group from 1968 to 1971 had been accepting large cash bribes in return for various favors.

At a news conference last week, Joseph A. Phillips, Mr. Nadjari's chief assistant, said the indictment of John Egan, a former lieutenant in the unit, had led investigators "one step closer" to formally charging a then-unidentified detective as "the principal brain" behind the theft of the narcotics.

Mr. Phillips further said that the unidentified detective, who he said had "directed" the theft of heroin and cocaine, was "the kingpin of corruption in the Police Department at that period of time."

The official added that the alleged organizer of the scheme retired from the department shortly after Joseph Nunziata, another detective, apparently committed suicide after being informed that Federal agents wanted to question him about a separate allegedly corrupt transaction. The forged signature of Detective Nunziata appeared on a number of the vouchers used to withdraw the narcotics from property clerk's office.

Lieutenant Egan, the No. 2 commander of the Special Investigating Unit, was indicted on a perjury charge in connection with his statements to a grand jury concerning the alleged payment of a bribe of between $5,000 and $15,000 in return for information about a telephone tap placed on the phone of Vincent Papa, a convicted heroin dealer.

The indictment also said the grand jury was investigating whether "the bribe in relation to the wiretap was the first in a series of bribes which ultimately effectuated the illegal removal of narcotics from the New York City Police Department property clerk's office."

Mr. Papa, now in Federal prison, was indicted for contempt by the same grand jury last August for refusing to answer a number of questions, including one that said that on Feb. 4, 1972, he had in his possession about $1-million to buy heroin and cocaine stolen from the Police Department.

Mr. King, who lives in Chappaqua, N. Y., joined the department on June 13, 1956. He spent several years as a plainclothesman in the Bronx and first became a narcotics detective in 1963.

Ex-Detective Is Linked to Drug Dealer

The former detective described as the prime suspect in the theft of $70-million worth of cocaine and heroin from the New York Police Department served as a bodyguard for the children of a major narcotic dealer, law-enforcement sources said yesterday.

The suspect, Frank King, was said to be one of two former New York police officers hired by Vincent Papa after he became concerned that other underworld figures might attempt to harm his children.

Mr. King reached at his home in Chappaqua, N. Y., yesterday, said he had been advised by his lawyer to make no further comment on the case. "There's been a lot of heartbreak here," he said.

Basis of Movie

In an interview in The Daily News last Saturday, Mr. King openly acknowledged that he was the principal target of the investigation but he denied any involvement.

Mr. Papa, who is in Federal prison on unrelated charges was indicted last August for contempt—by a Florida grand jury impaneled by Deputy Attorney General Maurice H. Nadjari—for refusing to answer a series of questions about the theft of the 478 pounds of narcotics.

Much of the missing narcotics, which apparently was resold for distribution on the streets of New York City, originally was seized during the case that became the basis for the film, "The French Connection."

According to several law-enforcement sources, Mr. King and another New York police officer, former Lieut. Pasquale C. Intrieri, were hired as bodyguards for Mr. Papa's children shortly after the disappearance on May 18, 1972, of Emanuel Gambino, 144-55 27th Avenue, Flushing, Queens, the 29-year-old nephew of Carlo Gambino.

Wiretap Used

The nephew's body was found with gunshot wounds in a grave in Colts Neck, N. J., on Jan. 26, 1973. Law-enforcement officials theorize that Mr. Papa believed he might be held responsible for the killing of young Gambino and that some action might be taken against his children.

The first known contact between Mr. King and Mr. Papa came when the Police Department several years ago placed a wiretap on Mr. Papa's telephone. Mr. King, then a second-grade detective, was a member of the special investigating unit that installed the tap.

Two weeks ago, Lieut. John Eagan, the former commander of the special investigations unit, was indicted by the grand jury investigating the French Connection case on charges that he had lied about his knowledge of a $5,000 to $15,000 bribe that Mr. Papa allegedly paid detectives in return for information about the tap. Mr. Eagan has retired from the department.

Mr. Intrieri, who headed the unit before Mr. Eagan, retired in 1972.

'One Step Closer'

The indictment said this bribe was the first of a series that "ultimately effectuated the illegal removal of narcotics from the New York City Police Department property clerk's office."

At the time of Mr. Eagan's indictment, Joseph A. Phillips, chief assistant to Mr. Nadjari, said investigators were now "one step closer" to formally charging an unidentified detective as the "principal brain" behind the theft of the narcotics.

Mr. King, who is 39 years old, retired from the Police Department as a second-grade detective after 16 years of service, on April 3, 1972. He subsequently remarried and built a house, valued at between $75,000 and $100,000, in Chappaqua

Nadjari Alleges Hindrance By U.S. Attorney Curran

State Prosecutor Gets a Court Order Aimed at Obtaining the Testimony of a Witness Reported in Custody

By M. A. FARBER

Maurice H. Nadjari, the state's special prosecutor, yesterday charged the United States Attorney in Manhattan with impeding the prosecution by Mr. Nadjari of more than a half dozen police-corruption cases here.

Mr. Nadjari obtained a court order directing the United States Attorney, Paul J. Curran, to show cause why he should not produce Detective Robert Leuci, a key state witness in the cases. The state prosecutor is said to feel that without access to Mr. Leuci—an undercover agent who was cooperating with Mr. Nadjari until two weeks ago—the cases might be lost.

Since April 18, when Mr. Leuci reportedly told state and Federal officials that he had committed more criminal acts than he had previously admitted, the detective has been guarded by Federal marshals, according to Mr. Nadjari.

Interrogation Reported Blocked

An aide to Mr. Nadjari said in an affadavit yesterday that Mr. Curran's office had refused to allow the state prosecutor to question Mr. Leuci about his past or to permit the detective to appear before state grand juries investigating police corruption.

The aide, Stephen J. Fallis, called Mr. Curran's asserted actions "an arbitrary and unwarranted intrusion into the state's prosecutorial, judicial and police functions."

He said repeated attempts to gain the cooperation of Mr. Curran's office had been rejected.

Mr. Curran declined to comment on the show-cause order, signed at noon by State Supreme Justice John M. Murtagh. The order was scheduled to be answered in State Supreme Court at 10 A.M. today, but late yesterday Mr. Curran said he had filed a motion to have the order transferred to Federal court.

The United States Attorney would not comment on whether Detective Leuci was being guarded by Federal marshals.

Aids Knapp Commission

The detective, a stocky, 35-year-old former member of the Police Department's narcotics division, became an undercover agent in 1971 for the Knapp Commission in its investigation of police corruption.

In 1972, after telling Federal officials that he had served in numerous situations as a middleman for other detectives who were shaking down narcotics suspects, he became an undercover agent for the United States Attorney in an investigation of corruption in the city's criminal justice system.

Detective Leuci was the major Government witness in December, 1972, in the case of Edmund A. Rosner, a New York lawyer who was convicted of bribery and obstruction of justice. Mr. Rosner, who received a five-year sentence, has asked the United States Supreme Court to review his conviction.

Federal investigations in which Mr. Leuci has figured as an undercover agent have resulted in the indictment on corruption charges of eight persons, including a former assistant district attorney in Queens, several lawyers, a bail bondsman and a policeman.

Last August, Mr. Curran turned over to Mr. Nadjari about eight corruption cases in which the United States Attorney lacked jurisdiction and in which Detective Leuci was acting as an undercover agent. And since then Mr. Leuci has served as an agent for the state prosecutor.

Further Crimes Admitted

Two weeks ago, according to Mr. Fallis's affidavit, Detective Leuci unexpectedly told officials in Mr. Nadjari's office that his criminal activities prior to 1972 "far exceeded what he had previously admitted" to Federal authorities and had reiterated during the Rosner trial.

Mr. Leuci was not specific about the criminal activities he had kept secret, Mr. Fallis said. But, the state aide went on, the detective, who has never been prosecuted, said that he also wanted to discuss his actual criminal involvement with officials in the United States Attorney's office.

Mr. Fallis swore that after Detective Leuci went to Mr. Curran's office, his bodyguard of city policemen was dropped and the detective was "transferred to the custody of Federal marshals" to prevent his appearing before state grand juries and his discussing with Mr. Nadjari the full extent of his criminal activities.

The state prosecutor now needs Detective Leuci, Mr. Fallis said, so Mr. Nadjari can appraise the effect that the detective's new statement would have on cases in which he was an undercover agent and also to determine "whether we can and should vouch for Leuci's credibility" to juries.

There was no indication yesterday as to why Detective Leuci chose this time to disclose what he called his full criminal activities. Sources in Mr. Nadjari's office speculated that the detective feared that the true extent would be revealed by suspects in Mr. Nadjari's current inquiry into activities between 1968 and 1971 by the special investigations unit of the Police Department's narcotics division.

U.S. Judge Is Unable to Resolve Nadjari-Curran Dispute on Leuci

By ALLAN M. SIEGAL

After deploring the "unseemly" quarrel between the Special State Prosecutor and the United States Attorney here, a Federal judge tried and failed yesterday to arrange a closed-door settlement on access to an undercover anti-corruption witness.

But the dispute—over Detective Robert Leuci, key witness in more than half a dozen police-corruption cases — continued. Federal District Judge Arnold Bauman called a hearing for 10 A.M. Monday on the issue of who may question the detective.

The office of the special prosecutor, Maurice H. Nadjari, charges that United States Attorney Paul J. Curran has placed the detective in the custody of Federal marshals.

"Without access to Detective Leuci," Mr. Nadjari's office told Judge Bauman in a letter yesterday, "the special prosecutor will have no alternative but to dismiss indictments against corrupt public officials."

Stephen J. Fallis, an aide to Mr. Nadjari, submitted the letter in support of an effort to require that Mr. Curran immediately show cause why Detective Leuci could not be produced for questioning. Judge Bauman rejected the request for speed after determining that no state case was scheduled for immediate trial.

'Debriefing' Leuci

Calling the state m... plorable," Mr. Curran ... d Judge Bauman: "We are no... debriefing Leuci in an investigation now going on. As soon as this work is finished—promptly—we will make Leuci available." Later a Federal source mentioned a possible delay of three weeks.

Both sides continued their refusal to say what current cases involved Mr. Leuci, a 35-year-old former member of the Police Department's narcotics division.

It is known, however, that Mr. Nadjari is currently studying activities between 1968 and 1971 in that division's special investigations unit, including the theft of 398 pounds of narcotics, worth at least $70-million, from police custody. Some of the drugs had originally been seized in the so-called "French Connection" case.

Mr. Leuci's credibility as a witness is an issue in motions for dismissals of state indictments of five defendants, including four former policemen, in corruption cases.

In Federal Court, Mr. Leuci was the major Government witness against Edmund A. Rosner, a New York lawyer convicted last December of bribery and obstruction of justice. Mr. Rosner, sentenced to five years' imprisonment, has asked the Supreme Court to review his sentence and has moved to have Judge Bauman set aside the verdict.

There are reports that Mr. Curran wishes to keep Detective Leuci from saying anything that could upset the conviction. The United States Attorney is also studying past corruption in the New York police special investigations unit.

Before and during the Rosner trial, Detective Leuci admitted criminal acts. But according to papers filed by Mr. Nadjari's office in the last two days, the detective has since told of committing crimes that "far exceeded what he had previously admitted." Sources in Mr. Nadjari's office say they must learn more about those crimes before proceeding with any case in which he is a witness.

Sir:

You will please take ... of which the within is ... duly entered in the ... in the office of the Clerk

Dated, N. Y., ----------

Yours, ...

To

Sir:

Please take notice that ... will be presented for ... nature to the Honorable ... United States District Ju... the Clerk, Room 601, U... house, Foley Square, Boro... City of New York, on the ... 9 ----, at 10:30 o'clock ... or as soon thereafter as co...

Dated, N. Y., ----------

Yours, etc...

To

Sir:

You will please take notice that a _____ of which the within is a copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.

Dated, N. Y., _____, 19____

Yours, etc.,

_____

United States Attorney
Attorney for _____

To

_____

Attorney for _____

Sir:

Please take notice that the within _____ will be presented for settlement and signature to the Honorable _____ United States District Judge, at the office of the Clerk, Room 601, United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the ____ day of ____, 9 ____, at 10:30 o'clock in the _____ noon or as soon thereafter as counsel can be heard.

Dated, N. Y., _____, 19____

Yours, etc.,

_____

United States Attorney
Attorney for _____

To

_____

Attorney for _____

Form No. USA-33s-270
(Rev. 10-25-65)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SPECIAL PROSECUTOR FOR THE STATE OF NEW YORK

Plaintiff,

-v-

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, UNITED STATES MARSHALS SERVICE,

Defendants.

AFFIDAVIT

74 Civ. 1912

PAUL J. CURRAN

TEL. ~~264-3211~~
264-6118

United States Attorney
Attorney for U.S.A.

Due service of a copy of the within is hereby admitted.

New York, _____, 19_____

_____

Attorney for

To

_____

Attorney for

FPI-NI—2-2-73-50M-8754

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

SPECIAL PROSECUTOR STATE OF NEW YORK,

Plaintiff,

v. 74 Civ. 1912

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK and DIRECTOR OF UNITED STATES MARSHALS' SERVICE,

Defendants.

- x

B e f o r e:

HON. ARNOLD BAUMAN,
District Judge.

May 6, 1974
10:00 a.m.

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York

STEVEN FALLIS, Esq.,
Attorney for Plaintiff

ALSO PRESENT:

ALAN DERSHOWITZ, Esq.,
Attorney for Edmund Rosner

THE CLERK: Special State Prosecutor of the State of New York v. The United States Attorney of the Southern District of New York and Director of U. S. Marshals' Service.

MR. CURRAN: The government is ready, your Honor.

THE COURT: Where is the Special Prosecutor's representative?

MR. CURRAN: He was here a minute ago, your Honor.

THE COURT: Ten o'clock means ten o'clock, Mr. Fallis, not 10:07.

Go ahead, Mr. Curran.

MR. FALLIS: Your Honor, I apologize. but we were here at ten o'clock. We were just outside the door reading the material that Mr. Curran presented us with.

THE COURT: All right.

Go ahead.

MR. CURRAN: May it please the Court, I have handed up to the Clerk of the Court the original affidavit and the memorandum of law in this matter, your Honor, and I have served copies on the lawyer for plaintiff.

I think, your Honor, a brief statement of the background of Robert Leuci, about whom this whole situation devolves,is in order because it is most important that

the entire dispute be placed in proper perspective.

Very briefly, your Honor, back in about April of 1971 Robert Leuci began to cooperate with the United States Attorney's Office in this District in an undercover capacity, and during the course of his working in that capacity, indictments came down.

One of those indictments involved Edmund Rosner, a case with which your Honor is quite familiar.

In July of 1972 Mr. Leuci was placed in federal protective custody.

In November 1972 Mr. Leuci testified at the Rosner trial.

At that trial, as I understand it, he admitted to the commission of three criminal acts, acts which he committed before he began to cooperate with the United States Government.

From then until last month, that is, April of 1974, Mr. Leuci persisted in this position that he had been guilty of no other wrongdoing pre-cooperation.

In August of 1973 in accordance with an earlier agreement made between my predecessor, Mr. Seymour, and Mr. Nadjari, a number of completed Leuci investigations were turned over to Mr. Nadjari's office for appropriate state action.

From that time on Detective Leuci was made available on some weeks, almost on a daily basis, for preparation and pesentation of these cases to the state grand jury.

These cases, which were given by the United States Attorney's Office to Mr. Nadjari's office and properly given, should have been given, required little if any further investigation.

These are the cases which, as I understand it, it is now claimed were impeded, even though by Mr. Fallis' own statement of Friday before your Honor, none are scheduled for trial and others, although turned over some nine months ago, have apparently not yet been presented or at least fully presented to the state grand jury.

In February of 1974, your Honor, this office, the Southern District United States Attorney's Office and the Eastern District United States Attorney's Office began to cooperate actively together in a joint investigation into the drug enforcement of the Narcotic Laws in New York City.

An area of special emphasis in that joint investigation was and is narcotics corruption, and I stress narcotics corruption, your Honor, in the New York City Police Department's Special Investigations Unit, as it was formerly called.

That, your Honor, was the so-called Elite Narcotic

Enforcement Unit of the New York City Police Department which was supposed to deal with the major violators and major cases.

That joint investigation has been and is being cnducted both by the two United States Attorneys' Offices along with representatives of the Drug Enforcement Administration, Federal, the Internal Revenue Service, Federal, and the New York City Police Department.

In the past something less than three months, there have been eleven indictments returned as a result of that investigation involving thirteen former SIU detectives and four other alleged non-police officer narcotics traffickers and these indictments charge or the charges included selling or facilitating the sale of heroin, obstruction of justice and income tax evasion.

That investigation, your Honor, is still very active and federal grand juries in both districts are now hearing additional evidence on these and on related cases.

Next in the chronology, if I may, your Honor, and this is most important, I believe, because of what has been suggested or implied in the state papers, Mr. Nadjari's papers, in the monthof March and in early April of 1974, Mr.Giuliani and Mr. Jaffe of my office -- Mr. Giuliani is head of the Narcotics Unit, Mr. Jaffe is head of the Offici

Corruption Unit, - had a number of talks with Robert Leuci who was still in federal protective custody and still is in that status and based upon information and leads and some indications stemming out of the SIU investigation being conducted by both Districts and not based upon any information or leads obtained from Mr. Nadjari or not based upon anything set forth in papers filed by the Defendant Rosner in support of a motion to vacate the conviction, based upon other leads, Mr. Giulian i and Mr. Jaffe questioned Mr.Leuci and questioned him rather closely about other pos - sible wrongdoing.

Leuci at this time, your Honor, was still being made available to Mr. Nadjari as needed. Apparently during this period Mr. Leuci discussed with one or more of Mr. Nadjari's assistants, according to Mr. Leuci at least, pressure being put on him by Mr. Giuliani and Mr. Jaffe; and by the Eastern District, Mr. Puccio, pressure to tell the truth.

In fact, Mr. Leuci, during this period, stated to my assistants that he was told by assistants in Mr. Nadjari's office, that various assistants in my office could not be trusted and it was suggested to him, according to Leuci, that he make any disclosures he had to Mr.Nadjari's office and not to my office even though, your Honor, at this

point my office had come in to certain information and was actually investigating it and was attempting to talk to him and he is still in federal protective custody.

On the evening of April 17, 1974, Mr. Leuci made disclosures for the first time of prior--

THE COURT: What is that date?

MR. CURRAN: April 17, 1974, your Honor, in the evening or starting, I guess, in the late afternoon, made disclosures of prior wrongdoing not previously admitted to to Mr. Giuliani and to Mr.Puccio, the Chief of the Criminal Division in the Eastern District.

He admitted to his involvement in criminal acts over and above those disclosed at the Rosner trial and began to go into some detail.

Since then there have been debriefings, comprehensive debriefings of Mr. Leuci; we are covering a fairly extensive period of time here, your Honor, Assistant United States Attorneys in both Districts, DEA agents, IRS agents and New York City Police Department officers, have been actively working with our two offices, Southern and Eastern Districts, in an attempt to corroborate certain information presented by Mr. Leuci and put evidence together for presentation to federal grand juries in both districts.

Now, I stress, your Honor --

THE COURT: Is that the present posture, is it your present idea that based on what Mr. Leuci has been telling you that you do plan, as of now, to present certain cases to the grand jury?

MR. CURRAN: Yes, your Honor. We are presenting them right now.

THE COURT: All right.

MR. CURRAN: I stress, your Honor, that these disclosures by Mr. Leuci were made to the Federal Government and specifically to representatives of my office and the Eastern District and not to anyone else.

Now, to underscore this, your Honor, and to perhaps highlight a little bit some of the problems we have been having, in connection with this effort at corroborating certain information which we had received, we requested on April 24th the New York City Police Department, with whom we have, I think, mangificent and true cooperation, to make available to us certain SIU files which were in Police Department custody.

The Police Department-- and this is a fairly routine thing, your Honor, we do it all the time back and forth and in a cooperative spirit,and files are made available.

The Police Department reported back to us that

the, had been instructed by Mr. Nadjari's office not to make these files available to us,so we responded that we would have to serve a subpoena.

Yhe Police Department said, of course, they had no particular problem with that, If we were going to do that, that was okay by them.

We were then told after serving the subpoena that they had been instructed to not honor the subpoena or to move to quash it.

The Police Department, of course, did not do that and the files were produced by the Police Department pursuant to the subpoena.

That was April 25th.

Stepping back, your Honor, to two days after the initial Leuci disclosure of April 17th to Mr. Giuliani and to Mr.Puccio, on April 19th, I had a meeting with Mr. Nadjari and his Chief Assistant Mr.Phillips in my office; Mr. Mollo, the Chief Assistant United States Attorney was also present.

The bulk of that meeting was devoted to a totally different subject, entirely unrelated to this matter or anything connected with it.

But as the meeting was concluding, I was asked by Mr. Phillips and Mr. Nadjari whether Mr. Leuci was going

to make his disclosures to us and to them and whether he would be available to them.

I told them that he had already made certain disclosures and that he would not be available to them until after we had conducted the investigation which we thought we had a responsibility to conduct in connection with those disclosures, and that this was an ongoing thing, and he would be made available in due course, but not now, and I would make him available as soon as I reasonably could.

I had no further conversations with either Mr. Nadjari or Mr. Phillips on the subject of Mr. Leuci and his availability to the state grand jury and I have had none, I guess, to date since then.

As your Honor knows, this application was made on April 1 by order to show cause. We received it shortly after 1:00 p.m. on Thursday, May 1. It was returnable before Justice Murtagh on Friday morning, May 2 at 10:00 a.m. and the demand was made that we either produce him or make sure that he was produced before a state grand jury.

The application was made available to the media as far as I could tell either before or just about the same time we received the papers and it would appear, your Honor, that the application certainly could have been made, if it had to be made at all, in camera, and this

matter could have been resolved without the publicity which has unquestionably jeopardized the investigations we are now attempting to conduct and without any detriment to the cause of justice to anybody involved in this matter.

The May 1 application, your Honor, suggests and subsequent leaks to the press by the state prosecutor suggests that the United States Attorney's Office was engaged insome sort of cover-up of information from Leuci to suppress his disclosures because of the Rosner case and the pending Rosner motion.

Your Honor, on April 23, as your Honor knows, this Court, your Honor, was informed by letter in camera of what was going on and of these disclosures and essentially what the government was attempting to do and was indeed doing about that.

I want to stress as strenuously as I possibly can that that implication, that suggestion is just dead wrong. This office recognizes its responsibilities to justice, to Mr. Rosner indeed and to this whole matter, and we informed the Court just as promptly as we could reasonably do so by sealed letter exactly what we were aware of and what we were attempting to do about it.

THE COURT: Let the record indicate that I did receive such a letter and in the interests of justice, I

ordered it sealed and filed.

MR. CURRAN: Your Honor, that is the chronology bringing us upt to somewhat at least to date.

The problem with both leaks to the media and deliberate public disclosures of investigations, leaks and public announcements disclosing details, mentioning suspects and informants or at least indicating who they are is set forth fully and documented in the government's affidavit and in the attached exhibits to that affidavit.

Those exhibits, your Honor, demonstrate, as far as we are concerned, as far as I am concerned, a pattern of public disclosure of subjects and witnesses, naming crimes and indicating possible defendants who have not been indicted; factual details with respect to informants have been put out in that fashion and it is reflected in the exhibits to the affidavit by the state prosecutor and this is another and compelling reason why in our judgment and in my judgment, Robert Leuci should not be made available now to the state prosecutor.

Now, your Honor, at this point I would like to hand up to the Court what has been designated a supplemental affidavit to be submitted to the Court in camera which sets forth additional reasons why I have taken the action which I have taken in this matter and, as I indicated to

your Honor Thursday, I have taken this action reluctantly.

I would ask, your Honor, that that be reviewed by the Court in camera and ordered sealed and I am serving a copy of it on the attorney for the plaintiff and I would ask your Honor --

THE COURT: May we all take a moment to read it, then?

MR. CURRAN: All right, sir.

THE COURT: Before I do that, with respect to the letter that you caused to be delivered to me in connection with the Rosner case, in light of these circumstances, is there any reason to continue that letter under seal?

I have forgotten the exact contents of it, really. Perhaps you would like to look at your office copy.

MR. CURRAN: I think probably not, but I would like to review the one copy that I have before committing myself finally to that course.

THE COURT: Will you let me know about that?

MR. CURRAN: Yes, sir, I will.

THE COURT: All right.

(Pause.)

THE COURT: Mr. Fallis, have you had an opportunity to read this?

MR. FALLIS: I have not had an opportunity to read

anything that has been submitted by Mr. Curran, your Honor.

We submitted our papers--

THE COURT: Excuse me, I just read this. We will sit here while you read it.

MR. FALLIS: What about the other papers?

THE COURT: Read this document.

(Pause.)

MR.FALLIS: I have read it, your Honor.

THE COURT: I am inclined to order this document sealed and I do order this document sealed and I direct the parties, both parties, and the members of their staffs to make ho extrajudicial statements concerning the contents of this statement.

That is the order of the Court.

You may proceed.

MR. DERSHOWITZ: May we be heard on that particular issue?

THE COURT: I am afraid you do not have standing in this situation. I am certain that you will take another opportunity to make a motion addressed to Mr. Rosner, Professor Dershowitz.

Go ahead.

MR. CURRAN: The issue presented--

THE COURT: I think the record should indicate

that Professor Dershowitz, I believe, is handling the matter of Mr. Rosner at this time, is that correct?

MR. DERSHOWITZ: Yes, it is.

MR. CURRAN: The issue that has been presented to the Court stated by Mr. Nadjari is whether the United States Attorney's Office can arbitrarily interfere with the state's legitimate prosecutorial,judicial and police functions and I submit, your Honor,that that does not really state the issue very accurately and does not reflect the issues presented at all.

The issue, your Honor, is whether a state agency may by use of state process compel the United States Government to produce before a state grand jury a witness who is in federal protective custody.

Your Honor, we submit there are three separate and independent bases why this application must be denied.

First, I think it is established in our brief that a state prosecutor lacks jurisdiction to compel the production of any person who is in federal custody or otherwise held under the authority or claim of authority of the United States, and this proposition, your Honor, is discussed I believe fully in Point 1 of the Government's brief.

THE COURT: I notice in the government's brief

that you suggest that protective custody in this connection at least is no different from arrestive custody.

However, there is a paucity of authority. I would think this is the case surely first of record, but is that your argument? I mean, after all, so much of your argument in the brief proceeds from the fact that he is in custody, but basically he is in protective custody rather than in the type of custody contemplated by an arrest, isn't that correct?

MR. CURRAN: That is correct, your Honor. Our position in that respect is that any order of a court forcing the United States to bring Robert Leuci any place forces the United States to act upon someone that they have in custody and that the custody or the kind of custody is immaterial.

We make the point, I think, your Honor, that if robert Leuci were to attempt to leave protective custody for some reason, he would indeed be arrested and arraigned as a material witness. I think that the kind of custody is not dispositive or important, your Honor, but the point is that he is in federal custody and that a state may not compel the federal government to produce him somewhere, but that requires federal action, marshals who have to go with him, action upon someone who is in the custody of the

United States Marshal.

THE COURT: Is he being detained by the United States Marshals?

I am trying to get the extent of the custody we are talking about.

MR. CURRAN: So far as I know at this moment he is not being detained against his will, but he is in their custody and should he attempt to leave that custody, he would then be detained and brought before a court and arraigned as a material witness.

At this moment, as far as I know, he is not being detained in the sense, because there is no reason to do that. He hasn't attempted to leave the custody.

THE COURT: That is interesting. He is not being detained, but the moment he tries to go, he will be, is that it, Mr. Curran?

MR. CURRAN: That is correct, your Honor, yes.

He is not being detained because he has expressed no desire to leave the federal custody and the protection of the marshals and I would point out, your Honor, the reason for that custody over and above the status which has gone on for a couple of years now has been that in the most recent disclosures, without going into any details, there has been information at least furnished which we are now

investigating involving organized crime figures.

Your Honor, I submit that the rule, which I have just enunciated, is so well-settled that it has been codified in the New York State Criminal Procedure Law.

The law, as I understand it, the state prosecutor operates under and observes.

Second, in seeking to compel the United States to take specific action or to restrain it from acting, Mr. Nadjari's office seeks specific relief against the United States Government and as we discussed in Point 2 of our brief, such an action cannot lie against the United States Government absent authorization by a specific Act of Congress and, your Honor, we submit that no such specific authorization exists on the federal statutes.

We submit that that principle, the principle, if you will, of sovereign immunity requires dismissal of the instant application.

I would say, your Honor, that these principles would obtain regardless of how long the custody were to continue, but I want to stress again, as I did on Friday, we are not taking the position, which I think we have a right to take, that this will go on ad infinitum or indefinitely.

I have said then and I say again that we will make Robert Leuci available to Mr. Nadjari's process or to his

office just as soon as we have completed fully and responsibly the investigation which we are now engaged in,which investigation is based upon, at least largely, disclosures and information and leads which Robert Leuci has given to us and to no other agency.

THE COURT: I notice in Mr. Nadjari's brief that they I am empowered to act under the principle of the powers of the Federal Courts to supervise the administration of the criminal law.

What is your response to that?

I am aware of the fact that that is generally invoked in cases where federal officials are involved in connection with federal investigators, people of that kind, misconduct by federal people.

What is your reaction to the statement made in their brief about that?

MR. CURRAN: Your Honor, I have read the brief very quickly.

THE COURT: We all have.

MR. CURRAN: I got it at the same time he got ours. My reaction to that, your Honor, is that in this case it certainly doesn't apply because I would assume that there must be some showing before a court would seek to intervene in matters thatare really the responsibility of

the Executive Department.

Your Honor, there must be some showing that the United States Attorney or his Assistants acted in some way improperly or in violation of law or in violation of some court rule and I submit, your Honor, that has not appeared here and, therefore, I cannot agree with that position at all that the Court should intervene or inject itself at this juncture on this record.

Your Honor, over and above what we believe to be settled and solid legal principles, I want to stress again we are not seeking to stymie the state. We never have and we are not now. I have cooperated and I have been experienced in federal and local law enforcement with District Attorneys, with Special Narcotics Prosecutor Rogers, with the Organized Criminal Task Force of the State, Judge Fisher and Mr. Tendy, the New York City Police Department, all kinds of agencies, and we do it every day and we do it willingly.

We recognize the state prosecutor's interest in this matter, but we also believe that we have an absolute obligation to the investigation we are conducting not to make him available now, that is, Robert Leuci.

Our responsibilities, your Honor, must be discharged, we submit, without state interference at this time.

I have tried to set forth briefly in oral argument - I think it is done more fully in the papers, your Honor-- the reasons for our action and the case law in support of the position that I have taken here, and as I said before, we have done this and we have certainly done it publicly with great reluctance.

We are prepared to make him available when our investigation is completed and we expect your Honor, and I represent to the Court that we will have it completed just as promptly as we can humanly do it.

For the reasons I have advanced in oral argument, and in the papers, your Honor, the United States Government's application is that this order to show cause be vacated and the application or the petition or the matter be dismissed.

THE COURT: All right, Mr. Curran.

I am going to ask the Clerk at this time to seal the affidavit that was handed up to me during the argument.

Mr. Fallis.

MR. FALLIS: Thank you, your Honor.

First of all, I would like to say that while Mr. Curran has had the opportunity to examine our papers since last week, at ten o'clock this morning we received

his factual statements and his argument on the law.

THE COURT: Mr. Fallis, if either of you want a couple of days to submit additional papers, you may have it. I told you before and I tell you again that this will be a matter of first priority in terms of decision in my chambers, but since it is a case which appears to me to be a case of first impression, I think if you want two days in which to reply and, you too, Mr. Curran, you may have it.

I would anticipate, however, that any opinion I write would be filed not later than next Monday and perhaps this Friday.

MR. FALLIS: Your Honor, the only point in the papers that we would want time to answer are the scandalous, sensationalist charges by Mr. Curran about leaks in our office.

It is a question of the kettle calling the pot black or the reverse. It was Mr. Curran who took reporters out on a major drug raid and was criticized for doing so by --

THE COURT: Please don't interrupt, Mr. Curran. I will permit you to respond at the appropriate time.

MR. FALLIS: -- and was criticized by a judge of the federal court.

It was the U. S. Attorney's Office that caused

an article to be written about Detective Leuci in Life Magazine.

We state that for all- we deny all these allegations, all these charges.

From my brief review of those papers and of the other papers, they are simply statements and assumptions not based on facts.

I say if given the opportunity, we could cite chapter and verse, the same type of conduct and prove the same types of conduct on the part of the U. S. Attorney's Office.

THE COURT: Is Wednesday, five o'clock, sufficient time?

MR. FALLIS: As to that point, your Honor, if that is relevant-- in any way to your decision, then we would request time to respond on that matter.

That is my only point. I feel it is not relevant.

THE COURT: As I see the question now, it is what is the power of a member of the third branch, so to speak, to direct a prosecutor, a member of the executive, in the day-to-day performance of his prosecutive duties.

That is the matter that has interested me from the first day I heard about this application.

MR. FALLIS: I would like to respond to that now, your Honor.

THE COURT: Yes. You may, if you want to, respond to this other matter, but I really don't think it is going to figure very importantly in the decision of this case.

Is that clear?

MR. FALLIS: Which other matter?

THE COURT: The allegations of who was talking to the press and who is misleading and all of that sort of thing.

MR. FALLIS: Based on that, I am fully prepared to continue with the argument that is relevant to the matter before the Court.

May I proceed?

THE COURT: Make whatever argument you want, Mr. Fallis.

MR. FALLIS: The important issue here is that in the government's papers they do not deny the important and relevant factual allegations of our papers.

We allege that the United States Attorney's Office removed the police bodyguards from Detective Leuci and placed him in the custody of the Federal Marshals for the purpose of preventing Leuci from being served with a state

subpoena.

That, your Honor, we submit is an abuse of authority beyond the scope of the authority of the United States Attorney's Office and, quite frankly, an abuse of the Court process of the United States Courts.

To put him in protective custody or to give him bodyguards who are marshals, to protect him is perfectly all right, but I submit that it is not proper to assign bodyguards to a man for the purpose of preventing the state from serving a lawful subpoena on him and that allegation has not been denied in the papers and I would request a hearing to prove to a certainty that allegation.

Secondly --

THE COURT: To prove, Mr. Falls, that that is the only reason that the United States Attorney is holding him in this way?

MR. FALLIS: Your Honor, Detective Leuci has been body-guarded for a period of several years. He has been in the custody of the New York City Police Department until the U. S. Attorney's Office learned that we were about to or contemplated issuing a subpoena to Detective Leuci.

We suggest that is the only reason that they removed the police bodyguards and put the marshals on.

Now, of course, the marshals are still performing

the protective custody function, but their reason for putting the marshals on him was to prevent us from serving a subpoena.

In factual support of that, on the one occasion that one of our men was permitted to see Detective Leuci, and it was the Friday following the 19th, I believe it was the 26th, Detective Leuci was called down and - this I am getting from my investigator -- Detective Leuci was called down to Mr. Giuliani's office and Leuci came back from his office and he said that they had just learned that the special prosecutor was about to order or request the Police Commissioner to produce Leuci at our offices and that, therefore, they were taking-- removing the police bodyguards to avoid that and placing him in custody of federal marshals.

This is what Detective Leuci told an investigato- from our office.

The second factual allegation that is not denied is the allegation that the U. S. Attorney's Office ordered Leuci not to speak to myself or anyone in my office relative to his allegation-- relative to his new disclosures.

I don't know by what power any prosecuting attorney can order a witness not to talk to someone.

We must remember that whether it was put in the form of a suggestion or the form of an order, there was,

shall we say, something behind it because the whole reason that Detective Leuci made these new disclosures was that he was under the threat of indictment.

And, indeed, Mr. Currant stated in his argument oncustody, that if Detective Leuci left custody, he would be arrested, so there is no doubt, your Honor--

THE COURT: And arraigned as a material witness, was the rest of that sentence.

MR. FALLIS: And arraigned as a material witness so there is no doubt that the United States Attorney's Office has intimidated or coerced Leuci into following their directives.

In other words, they have some power behind their suggestion and orders to Detective Leuci.

Now, again, it may be proper not to produce Detective Leuci and we will get to that a little bit later, but they cannot, I submit, and it is abuse of authority and beyond the scope of their authority to order a state's witness not to speak to the special prosecutor about state crimes that he was involved in.

Both of these acts on the part of the U. S. Attorney's Office, neither of which are denied, violate the standards of the penal law of New York State ordering a state's witness not to talk or not to appear for grand

jury or appear to the state prosecutor, his conduct is tantamount to tampering with a state's witness and is a violation of the New York Penal Law.

Actively and forcibly preventing the service of a subpoena by lawful state agents on an individual within the jurisdiction of the state is action which is tantamount to the crime of obstructing governmental administration.

Now, clearly, first of all, with regard to your Honor and the federal court, we are in federal court now. Your Honor certainly has supervisory and injunctive powers over federal officials to enjoin them from continuing illegal and improper acts with a gun under the color of law, whether done in their daily routine if they are illegal and improper; the mere fact if a U. S. Attorney commits a crime, the mere fact that it is a part of his daily routine, does not prevent the District Court in their supervisory and injunctive powers from stepping in.

We would request-- we also have an iddue in the state court, and I will get to them both.

THE COURT: Let me put a question to you that troubles me a little. I am certainly going to consider the applicability of the advisory powers of the court, as you asked me to do in the brief.

Let me put a question to you that troubles me and it has no application to this case at all, but the precedential value of the decision might affect the kind of hypothetical case I am going to put to you.

In this case we have two public officials of utmost integrity and so that is how it differs from the case I am going to put to you.

Supposing, however, a state court prosecutor somewhere in the United States for not so noble reasons wants access to a federal witness in protective custody; now, Mr. Fallis, you can see the danger of that, and I am sure we all know that there may be places in the country where such a gambit is likely and I am concerned about the precedent I would be setting were I to follow your proposal.

Would you respond? I am not indicating for a moment that I won't, but I do want you to know what is in my mind.

MR. FALLIS: I understand that, your Honor, but it seems to me that it is reasonable to draw a factual distinction. The issue here is the illegal activities by the federal prosecutor.

Now, for the Court to condone or not step in and prevent this illegal activity, the burden would be on the federal prosecutor to show, in fact, that the state

official was interested in obtaining this witness for other than legitimate reasons.

That seems to be clear, but the burden would be on the federal prosecutor to maintain their position because, as again as I have stated, the two acts which I state violate state law, and which have not been denied and thereby to my way, admitted by the U. S. Attorney's Office are very serious.

It is a misuse of federal marshals for a purpose for which they have not been authorized and telling a witness that they cannot speak to a prosecuting attorney.

First of all, with regard to the position in the District Court, I think this is a perfect and proper case for your Honor to enjoin those acts, those illegal acts, by the United States Attorney's Office.

Now, with regard to the state court, the state court has again powers to ensure that its proceedings are not impaired and that its mandate and processes are not interfered with.

This is the general contempt provisions of the state law, particularly Section 750 of the New York State Judiciary Law and Section 753 of the New York State Judiciary law, and all the body of case law which flows from that.

We have here on the subpoena issue particularly an active interference with the mandate and process of the state court.

Now, a subpoena is and has been held in New York State to be a mandate and process of a state court.

It is an order of the court even though it is generally issued by a federal district attorney.

Now, while the federal government perhaps cannot be sued, there is no immunity for the federal government and federal agents for violations of state law.

Now, Justice Murtagh, having facts presented before him which led inescapably to the conclusion that there was an interference with the mandate of the state court, clearly had inherent power to inquire into that.

It would be somewhat in the nature of a contempt proceeding; as your Honor must know, for example, if a witness is called before a grand jury and refuses to give testimony, he is very often given an order to show cause by which he is brought before the judge at which time often the judge will then direct the witness to testify before the grand jury and if failing to do so, can hold that witness in contempt of court.

What we sought to do here was have the United States Attorney's Office appear before Judge Murtagh on

the charge of having interefered with a state process, the issuance of a subpoena by changing the bodyguards for that purpose, to give them an opportunity to explain that interference or justify that interference, to perhaps conduct a hearing to satisfy the Court as to that interference and in failing to comply with the request or oder of the judge, then there would be the potentiality of an actual contempt proceeding.

But there is no law which allows the United States Attorney's Office to violate the state law, the state law regarding contempt, and the state law with respect to the judiciary law.

I submit that the state court would have that power.

I can imagine if there was a case pending before your Honor in the federal court in which a witness was in a room and in which five citizens, five bodyguards or what have you were stationed outside that room and thereby the United States Attorney was prevented from serving lawful process on that witness, I am sure your Honor would have no doubt that you would have the power, by way of order to show cause, to bring those people before your Honor.

Now, the fact that in this particular case, the persons interfering with the lawful process are United

States Attorneys--

THE COURT: That is all the difference in the world, Mr. Fallis.

MR. FALLIS: Does not make a different, your Honor.

THE COURT: I respectfully suggest it does becaus we are talking about the system of checks and balances in government and if five fellows simply surround some fellow who they don't want to permit to be served, that surely is altogether different from a decision made by government officials in the executive branch and the review of such a decision by the judiciary.

MR. FALLIS: What is involved there, your Honor, is an assumption that the government officials are doing it for good cause and for legal cause.

There is an assumption in that. We state that you cannot make that assumption in this case in light of the history of the case and in light of the particular actions and particularly in light of the failure of the United States Attorney's Office to respond.

We submit that their whole basis and their whole reason for doing this is not all this-- all these papers and charges, but they simply want to win some hypothetical race to the courthouse door in this particular

case.

THE COURT: Well, I think I now have heard enough charges and counter-charges of this type and I am going to ask counsel for both sides to limit their remaining argument to the law.

MR. FALLIS: Your Honor, Mr. Curran indicated that Leuci was in protective custody. I think we have established that the United States Attorney's Office has not established so to speak, that they cannot be charged in state court or brought before the state court.

Ghe issue now is whether there is an overriding federal law or principle which would prohibit the state court or indeed your Honor, as a district court, from acting.

Detective Leuci, according to Mr. Curran, is in protective custody. Protective custody is a legal fiction. It has no legal significance or legal meaning with respect to the rights of the individual.

He is in protective custody under the omnibus Crime Control Bill. I have read that and no place in the provisions of the omnibus Crime Control Bill relating to custody, relating to protection, is the word "custody" even used.

The word "protective custody" is a term of art an'

does not have legal relevance as in the cases cited by the United States Attorney's Office.

A prisoner is in legal custody because a court has ordered-- has restrained his freedom in a significant way.

A federal court-- a material witness, a federal material witness conceivably might be in custody because again that is by order of the court, not by fiat of the Attorney General or the United States Attorney.

No man is legally in custody such that the state cannot have access to him unless it is by order of the court.

THE COURT: If the test is custody, Mr. Fallis, I was not attempting to be humorous when I asked Mr. Curran before if Mr. Leuci attempted to leave, would he thereupon be arrested, and I did that for a purpose.

I was trying to find out whether he was free to go. Mr. Curran, in substance, says not really.

Therefore, is he not in custody as that word is used, namely, he is not free kto go; he is held by government officials and should he attempt to go, there will be legal constraints put upon him.

Is that not custody;is the question?

MR. FALLIS: It is custody in the dictionary sense

of the word, but in the sense of the meaning, that certain legal ramifications might flow from it, it is not legal custody.

If I, as a Special Assistant Attorney General walked up to someone on the street and said,"You are in my custody,"and forcibly kidnapped that man and took him to my office, he would be in custody.

It is not legal custody and he could get out of that custody at any time.

Simply because the word "custody" is used, well, I will withdraw that.

The cases that they cite refer to -- all the cases that they cite I believe refer to custody which is court-authorized, court-ordered.

The fact that Leuci is free to go at any time has some relevance, but the fact that he is detained without order of the court indicates that he is not in legal custody.

I don't think that that argument has any weight or any impact at all that the United States Attorney's Office has been making.

Certainly Mr. Curran cites Section650-30 of the Criminal Procedures Law which relates to witnesses-- federal prisoners and witnesses in federal custody.

Certainly New York State would not regard

Mr. Curran's actions as legitimate federal custody and bind itself to the proposition that it could not obtain him by lawful subpoena.

As a matter of fact, if Mr. Leuci, if Mr. Curran felt that by Leuci seeking protective custody was not amenable to process, then there would have been no necessity for him to surround him with United States Marshals to prevent the service of that subpoena.

I am sure that if right now Detective Leuci walked through the door, in the presence of the United States Marshals,and I walked up to him and handed him a subpoena, Mr. Curran's argument of protective custody would not prevent the appearance of Detective Leuci before a state grand jury.

Your Honor, we have established in our papers our pressing need for Detective Leuci. The United States Attorney's Office has had him for approximately two and a half weeks now exclusively - they say because they are debriefing him.

Your Honor, I submit that it does not take that long to debrief a person and for our purposes, which is to test his credibility and complete certain state matters which are pressing, we would be willing to take Detective Leuci for a period of two days to complete our business and

turn him back to the United States Attorney's Office for as long as they want him so that they can leisurely debrief him.

Unfortunately, the crush of state matters and the crush of cases in the Special Prosecutor's Office prohibits us from leisurely debriefing witnesses.

As I say, if your Honor is in any way considering consideration of the charges of the United States Attorney's Office in his decision, then we would request ample opportunity to respond.

Thank you very much.

THE COURT: Yes.

Mr. Curran, did you want to say something?

MR. CURRAN: If I may.

THE COURT: I am going to say now that each side may have until Wednesday at 5:00 p.m. to submit whatever additional papers it desires.

Go ahead.

MR. CURRAN: Briefly, your Honor, in response to a couple of what I guess are the basic points made by the plaintiff -- first, talking about not responding - as far as I know, your Honor, there have not been pleadings in this matter and there was an order to show cause with an affidavit; I think, we responded fully.

We were confronted with a petition where one goes down the line and admits and denies and whatever.

Should there be a petition, we obviously would have so responded.

The basic point, as I understand it, is that we have misused the United States Marshals and directed the witness Robert Leuci not to speak to the State Prosecutor.

Your Honor, the witness has been in protective custody of the United States Marshals from the outset,going back to 1972.

What happened, as I understand it, is that when he wasout of the vicinity, he was in Marshal custody or from time to time the Marshals checked up on him.

After these recent disclosures came about to the United States Attorney's Office on April 17th, he was put in the custody of the marshals on a full-time basis. Initially, DEA and then marshals.

It had been the practice up until that period of time, somewhere around April 20th or 21st or 22nd, that when he was in New York City, members of the New York City Police Department would in a cooperative spirit with the federal marshals, take over the actual bodyguarding, but he was always, as I understand it, under the federal protective custody and operating under that statute.

We did indeed tell the marshals and the DEA to take him over full time and we did that for two reasons, your Honor.

DEA, incidentally, got involved first and then the marshals later. We did it first because we wanted no question about our investigation to go ahead unimparied by any intrusion by anybody and specifically intrusion by the public prosecutor until we were finished.

We did it secondly because of the disclosures that had been made and their ramifications, your Honor, I felt in the exercise of my judgment that it would be more sound at that time to have him exclusively in federal control to avoid any possible problems that might arise in connection with New York City Police Department personnel and given what he was then engaged in as a result of the disclosure.

Now, your Honor, as I understand their point, they charge the United States Attorney's Office with violating state law.

We violated no state law. We are acting in furtherance of our government obligations to the soverein, to the United States of America and that by no test, no matter how it is twisted or turned or analyzed, can be a violation by definition, cannot be a state crime or a state

contempt or anything else.

The whole purpose of the doctrine, as I understand it, your Honor, is that any relief that they asked for here would undo the whole concept of protective custody.

The very point of protective custody is and the cases do talk about this and the cases are not limited to people in jail or in actual situations, is that the United States Government will not be impeded in its governmental operations by any state process while those governmental operations are continuing under color of law or under claim of law.

If your Honor please, the analogy of an arrest, custody is defined by the United States Supreme Court in the Jones Case as restraint beyond that of restraint imposed on an ordinary citizen.

I submit, your Honor, that federal protective custody we have talked about is clearly that kind of restrai

If I might analogize it to an arrest, your Honor, he is not free to go.

THE COURT: It was that which I had in mind when I asked Mr. Fallis the questions that I asked, namely, the arrest custody. I think it is fair to say, and I say this with some trepidation in the presence of a Harvard Professor, that when a person is not free to go, and the

people who deny him is freedom to go are Police, I think that adds up to custody.

MR. CURRAN: You said it better than I did, your Honor, but that was my point.

I would also say that the Leonard case, another case cited in our breif, there the court, the Second Circuit here held that the government was not required even to disclose a witness' whereabouts and this was a witness who had been in protective custody even where there was a state court order involved.

We may, your Honor, respond in a supplemental memorandum, I think your Honor said two days?

THE COURT: Wednesday at 5:00 o'clock.

Is there anything else, Mr. Fallis?

MR. FALLIS: Yes. I would like to point out, your Honor, that the provision of protective custody is entitled Protective Facilities for Housing Government witnesses and there is notining, the word "custody" does not appear in that provision at all.

The word "protective custody" does not appear any place in the United States Code. It does not appear in Black's Law Dictionary. It appears no place in the law.

The question that is raised,is an actual and physical custody sufficient to prevent the state or any

other government instrumentality from serving a lawful subpoena on Detective Leuci.

That is the issue.

In other words, is the actual custody, the fact that Detective Leuci is sitting in Mr. Curran's office and the door is bolted, does that prevent us from serving a subpoena and I submit there is no authority on that.

What we have here, your Honor, is a factual question whether the United States Attorney's Office acted illegally and improperly. Mr. Curran --

THE COURT: Is that the specific auestion you want me to address myself to,whether the United States Attorney acted illegally? Is that the specific auestion you want me to address myself to?

MR. FALLIS: I submit that there are several questions in this, your Honor.

THE COURT: All right.

MR. FALLIS: Just one more point: Mr. Curran states that he violated no state law because he was doing it in the interests of the government. Well, that is the "Let the state be damned attitude," and I don't think that that is a proper attitude and I think that your Honor should step in and use his supervisory powers.

Thank you.-

lb-am

eo:mg 1

MR. DERSHOWITZ: Your Honor, could I be heard on a special emergency application on behalf of Rosner growing out this morning's proceedings?

THE COURT: Yes.

MR. DERSHOWITZ: I am not sure whether the parties to this case are aware or whether this Court is aware of the current pending nature of Mr. Rosner's certiorari petition before the Supreme Court.

THE COURT: I am totally unaware of it.

MR. DERSHOWITZ: It is very relevant to your Honor's order this morning.

On the 17th of April, the very day on which Mr. Leuci made disclosures to Mr.Jaffe, the United States Supreme Court sent a letter to the United States Government, the Solicitor General, requesting them to respond to the certiorari petition in that case.

On the 19th, if my memory is correct, the United States Solicitor General, the representative of the Justice Department, filed such a response in which they unequivocally denied at that time that there was any evidence of Mr. Leuci's involvement in any criminal activity.

In other words, two days after the United States Government learned of Mr. Leuci's alleged perjury in the Rosner trial, the United States Government, through its

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Solicitor General, who presumably was unaware of these disclosures, made a representation to the United States Supreme Court directly contrary to that.

Now, under the principle set out in the United States Supreme Court disposition of Mesarosh v. The United States, the United States Government is under an affirmative obligation to bring to the attention of the Supreme Court--

THE COURT: I would have no doubt that Mr. Curran will see to it that the Solicitor General is so informed.

MR. CURRAN: He has already been contacted on this very subject.

THE COURT: I have no doubt that the Solicitor General would call to the attention of the Supreme Court of the United States this change in his information.

MR. DERSHOWITZ: My point is this, in aiding him to do that, it seems to me that we should be -- at this point because there is a petition pending in the Supreme Court -- we should have access to all this information so that we can file a memorandum in the United States Supreme court bringing to the Supreme Court's attention all of this material.

It is for that reason that I would so move to have the United States Government turn this over to us today

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because as far as we know, indeed the Supreme Court may have decided this case today.

The schedule of briefing in the Supreme Court is such that the conference may have been on Friday of this past week or maybe this coming Friday, we don't know that, maybe the United States Government knows it.

If it turns out the conference was on Friday, then between the 17th and to this day the Supreme Court has not had access to that information.

If it is on Friday, it is imperative to bring this material to their attention.

THE COURT: Professor, I am only going to grant your application to this extent:

I think that Mr. Curran ought to notify the Solicitor General. I think that the Solicitor General ought to file whatever is necessary to be done immediately to indicate the fact that Mr. Leuci lied under oath at the trial of your client about his involvement in other criminality and I decline to grant your application with respect to the specifics, specific instances, about which the United States Attorney is now concerning himself with.

Any how, you have made a motion for a new trial returnable before me. The reason that I have not scheduled it is, of course, basically and technically the case is in

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the Supreme Court in Washington and, therefore, really, that has to be my reason for not having scheduled a hearing; although I can hold a hearing, certainly if I were to decide it favorably to your client, I could not now do that because the case is not in the District Court. It is in the Supreme Court.

MR. DERSHOWITZ: We would hope this would be obviated.

In the Mesarosh case when the Solicitor General brought identical information to the attention of the United States Supreme Court, the United States Supreme Court ordered a new trial, although the United States Government simply sought a remand for a rehearing.

We would hope this would be obviated.

THE COURT: I would be delighted if the Supreme Court would take that matter out of my hands.

MR. DERSHOWITZ: So would we.

THE COURT: I don't doubt that for a minute, Professor.

MR. CURRAN: I would say, your Honor, for the record, that I have had the chief appellate attorney, Mr. Gordan - I have had him get in touch with the Solicitor's office on this very issue and he has been in touch with the Solicitor's office on two occasions within the past week

eo:mq 5

and we are doing our utmost and we are living up to the obligations that we have to the Department in Washington and to the Court.

THE COURT: I would be sure of that.

All right, gentlemen, thank you very much.

Well, now, we will take a ten-minute recess before I call the regular criminal trial.

...

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

SPECIAL PROSECUTOR OF THE STATE OF NEW YORK :

Plaintiff, :

-v- : AFFIDAVIT

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, UNITED STATES MARSHALS SERVICE, :

Defendants. :

- -X

STEPHEN J. FALLIS, being duly sworn deposes and says:

I am the Special Assistant Attorney General in the Office of the Special State Prosecutor in charge of the above-entitled matter. As such I am familiar with the facts and circumstances in this case.

This affidavit is in reply to the affidavit of the United States Attorney in this case. There are a number of factual misstatements in the United States Attorney's affidavit.

First, the United States Attorney's Office did refuse to produce Detective Leuci and to let us question him concerning his disclosure of evidence of criminal transactions.

Second, I am informed by Mr. Nadjari and Mr. Philli that the United States Attorney never advised this Office that Mr. Leuci would be made available in any period of time or in "due course." He merely advised us that he would take our request up with Mr. Giuliani. Therefore, pursuant to Mr. Phillips' instructions to follow the matter up with Mr. Giuliani I discussed

it with him during the week of April 26, 1974. I personally spoke with Mr. Giuliani and requested that Detective Leuci be permitted to come to the Special Prosecutor's Office to complete preparation for an imminent departmental trial. Mr. Giuliani stated that Mr. Curran would not allow Leuci to come to the Special Prosecutor's Office. He stated that we would be allowed to see Detective Leuci at the United States Attorney's Office, with an Assistant United States Attorney present, if we guaranteed that we would not question Leuci relative to his new disclosures or serve him with a subpoena. I told Mr. Giuliani that I would make the guarantee for that meeting only, and that we might litigate the matter the following week.

It is interesting to note that after all this time the United States Attorney's Office has still not indicated in its papers when Detective Leuci will be available. In fact, it appears that the United States Attorney's Office is taking Leuci out of the jurisdiction in the evenings to further frustrate efforts to subpoena him. A New York Times report indicates "Later (after this Court's efforts to reach a compromise in a sealed proceeding) a Federal source mentioned a possible delay of three weeks." It is rather shocking that the New York Times can obtain information about the United States Attorney's contemplated actions while New York State's Courts and Grand Juries are kept uninformed.

Although it is not relevant to these proceedings the United States Attorney's allegation about publicity warrant comment. This Office like all other responsible law enforcement agencies, has consistently followed the policy that the public has a right to know and should be informed about governmental activitie In law enforcement, of course that policy, must be consonant with the canons of professional ethics, the rights of a defendant to a

fair trial and with a scrupulous adherence and the principle that the reputation of innocent individuals be at all times protected.

We believe that when a United States Attorney arbitrarily interferes with state trials and grand jury proceedings, the state courts have a duty to intervene immediately. I am sure that this Court would agree that it has a similar obligation. In addition, when the activities of a federal official have exceeded all normal or rational bounds and require that we go to Court for redress that is a matter of public record and of grave public concern. The public should be aware that a federal official is actively impeding state criminal trials and state grand jury investigations. The public should be aware that its governmental processes are being prevented.

Again, although it is irrelevant to the proceedings here a comment concerning our problems with proceeding with investigations involving Detective Leuci is informative.

In August of 1973 the United States Attorney referred Detective Leuci and the evidence he accumulated to this Office because the Federal Government did not have jurisdiction to prosecute the crimes disclosed by the evidence. This delay - of approximately two years - has caused difficulties in presenting these cases to the Grand Jury. This unbelievable two year delay occurred despite our constant prodding to obtain this evidence of corruption.

Mr. Curran asserts that the cases were presented to this Office in completed form. The truth is that essential witnesses were never spoken to, numerous tape recordings were not adequately transcribed, and important evidence had not been gathered. It appears the United States Attorney's Office neglected

to pursue or further investigate any of these cases because they lacked federal jurisdiction and placed them in a "back drawer" for two years. Corrupt public officials who were the subject of those cases were therefore permitted to continue on the public payroll and in a position to continue their illegal activities.

Finally, as we have already apprised this Court, the Leuci indictments are subject to motions to dismiss for failure to prosecute. At the beginning of this week, counsel for Bernard Geik wrote to this Office and demanded a speedy trial and threatened to move to dismiss the corruption indictment because of our failure to prosecute. As it stands now, we must consent to the dismissal of that indictment. Indeed, it is our plan, because of no feasible alternative, to move to dismiss all of the Leuci indictments if we are further interfered with in our efforts to subpoena the principal witness in these cases.

WHEREFORE, your deponent respectfully requests that this Court grant the relief originally requested in the Order To Show Cause issued by the New York State Supreme Court.

Stephen J. Fallis

STEPHEN J. FALLIS
Special Assistant Attorney General

Sworn to before me this
8th day of May, 1974.

JOEL COHEN

Notary Public, STATE OF NEW YORK
No. 31-5744427
Qual. New York County
Comm. Expires 3/30/76

SUPREME COURT OF THE STATE OF NEW YORK

EXTRAORDINARY SPECIAL AND TRIAL TERM

COUNTY OF NEW YORK

SPECIAL PROSECUTOR OF THE STATE OF NEW YORK,

Plaintiff,

-v-

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, UNITED STATES MARSHALS SERVICE,

Defendants.

AFFIDAVIT

MAURICE H. NADJARI

OFFICE OF THE SPECIAL STATE PROSECUTOR
2 WORLD TRADE CENTER
NEW YORK, NEW YORK 10047
(212) 466-1250

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPECIAL STATE PROSECUTOR OF THE STATE OF NEW YORK, Plaintiff, -against- UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, U. S. MARSHALS SERVICE, Defendants.	SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

STEPHEN J. FALLIS, being duly sworn, deposes and says:

I am a Special Assistant Attorney General in the Office of the Special Prosecutor who is charged with the responsibility of prosecuting the cases in which Robert Leuci is a principal witness. I am familiar with the facts in this matter.

This affidavit is made in support of this office's request for an order to show cause directing the United States Attorney and the Chief United States Marshal for the Southern District of New York to produce Robert Leuci before the Grand Jury in New York County so that he may be questioned concerning matters under investigation by that body, and to desist from interfering with and preventing the appearance of Detective Leuci before the Grand Jury.

Paragraph 1 of page 3 of my affidavit in support of the

Order to Show Cause dated May 6, 1974, reads as follows:

> Det. Leuci is also a principle witness in two outstanding sealed indictments obtained by the Special Prosecutor's Office. Those indictments should not be public nor should the prospective defendants be subjected to arrest if the disclosures of Detective Leuci will require dismissal of the cases. One of the defendants in fact has been actively sought since April 19, 1974. He may be located or surrender at any time and the problem will become an immediate dilemma.

At approximately 12:00 noon this date I received a call from the attorney for that defendant who wanted to make arrangements to surrender his client. Thus, the problems caused by the intransigence of the United States Attorney has indeed become an immediate dilemma.

Sworn to before me this
10th day of May, 1974.

Kenneth D. Kemper

KENNETH D. KEMPER
Notary Public, State of New York
No. 31-7225755
Qualified in New York County
Commission Expires March 30, 1976

Stephen J. Fallis

STEPHEN J. FALLIS
Special Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

SPECIAL STATE PROSECUTOR OF THE
STATE OF NEW YORK,

Plaintiff,

-against-

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK AND
DIRECTOR, U. S, MARSHALS SERVICE,

Defendants.

- -

SUPPLEMENTAL AFFIDAVIT

- -

MAURICE H. NADJARI
Deputy Attorney General
Special State Prosecutor
2 World Trade Center
New York, New York 10047

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SPECIAL PROSECUTOR OF THE STATE OF NEW YORK,

Plaintiff,

-against-

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK AND DIRECTOR, UNITED STATES MARSHALS SERVICE,

Defendants.

----------x

OPINION

74 Civ. 1912

A P P E A R A N C E S :

Maurice H. Nadjari, Special Prosecutor, State of New York (Stephen J. Fallis, Jordan J. Fiske, Special Assistant Attorneys General, of counsel) for plaintiff.

Paul J. Curran, United States Attorney, Southern District of New York (John W. Nields, Jr., Rudolph W. Giuliani, Steven J. Glassman, Assistant U. S. Attorneys, of counsel) for defendants.

BAUMAN, D. J.

On May 1, 1974, the Special Prosecutor of the State of New York, plaintiff herein, sought and obtained from Justice Murtagh of the Supreme Court, New York County, an order to show cause directing the United States Attorney for the Southern District of New York and the Director of the United States Marshals Service, defendants herein, to show cause why they should not be ordered to produce one Robert Leuci, a New York City policeman, before a New York County grand jury. That day

the Murtagh order was served upon the defendants who immediately and quite properly removed[1] the proceeding to this court pursuant to 28 U.S.C. § 1442(a)1.[2] The court has now heard oral argument on plaintiff's motion, and both sides have submitted briefs and affidavits in support of their respective positions. For the reasons that follow, the order to show cause is vacated and the action dismissed.

I.

Some factual background is necessary to provide a context for the instant proceeding. The narrative that follows, however, purports only to recite those facts which are undisputed and is unencumbered, I trust, by the rhetorical baggage that has freighted these proceedings from the outset.

Robert Leuci, a detective in the New York City Police Department, has been assisting various federal and state law enforcement agencies since early 1971. Between April, 1971 and approximately July, 1972 he worked as an undercover agent under the direction of prosecutors in the United States Attorney's Office for the Southern District. In that capacity he is alleged to have aided in the commencement of several cases, most notably United States v. Edmund Rogner et al., 72 Cr. 782, an indictment returned in this district in July, 1972 and tried before me in November and December, 1972.[3] Leuci was the government's principal witness at that trial, and was cross-examined vigorously and extensively about prior criminal acts committed while a member of the Police Department. He admitted only to four such acts, all of which

allegedly took place prior to his decision to cooperate with the government. From July, 1972 to the present Leuci has been the beneficiary of the protection afforded by §§ 501-504 of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 18 U.S.C. Chap. 223 (preceding § 3481), [4/] or what is colloquially termed federal protective custody.

In August, 1973 the United States Attorney made Leuci available to the Special Prosecutor, whose office, it should be noted, had been established by the Governor of New York to ferret out and prosecute corruption in the state's criminal justice system. Several investigations in which Leuci had been engaged for the United States Attorney were simultaneously transferred to that office. From that time onward, although he has remained in federal protective custody, Leuci worked with the members of the Special Prosecutor's staff in the pursuit of these investigations.

In February, 1974 a joint investigation into corruption in the Special Investigations Unit of the New York City Police Department was commenced by the United States Attorney's Offices for the Southern and Eastern Districts of New York. It appears that evidence disclosed during this investigation caused members of the United States Attorney's Office for this district to examine anew the truth of Leuci's previous accounts of the extent of his criminal activities. In addition, on March 21, 1974, Rosner filed a motion for a new trial, in 72 Cr. 782, in which it was alleged that Leuci had committed perjury at the trial by failing to disclose various criminal acts. Leuci appears to have been

subjected to persistent questioning, and finally, on April 17, 1974, he admitted to representatives of the United States Attorney's Offices for the Southern and Eastern Districts that his criminal conduct had been more extensive than he had previously conceded. Agents of the federal government have subsequently been engaged in investigating these new revelations.

The essence of the present controversy is that since April 17, the United States Attorney has refused to make Leuci available to the Special Prosecutor. The application to Justice Murtagh on May 1, now before this court, is designed to compel his production. The Special Prosecutor contends, in brief, that Leuci's testimony is crucial to the successful prosecution of several cases pending before the grand jury, and that a reassessment of his credibility may have an important bearing on the validity of indictments already filed. The United States Attorney, in turn, disavows any intention of withholding Leuci from the Special Prosecutor for an extended period, but insists that he requires sufficient time to "debrief" Leuci adequately and fully to investigate his new disclosures. Both sides have embellished their arguments with extensive accusations of bad faith that do not merit repetition here.

In resolving this controversy, however, I am not required to pass upon the merits of the prosecutorial policies followed by the parties to this action. For I have determined that in the present posture of the case, this court lacks jurisdiction to grant the relief which the Special Prosecutor seeks. It is to this matter that I now turn.

II.

Jurisdiction of the federal court on removal is, in a limited sense, a "derivative" jurisdiction. Where the state court lacks jurisdiction of the subject matter, the federal court acquires none, even though in a like suit originally brought in a federal court jurisdiction might have been present. Minnesota v. United States, 305 U.S. 382, 389 (1939); Lambert Run Coal Co. v. Baltimore & Ohio R. Co., 258 U.S. 377, 383 (1922). The problem for resolution, therefore, is whether the Supreme Court of New York had jurisdiction over this claim prior to its removal here. Stapleton v. $2,433,110, 454 F.2d 1210 (3d Cir. 1972). If it lacked such subject matter jurisdiction, removal cannot cure the deficiency and the action must be dismissed regardless of whether there exists "original" federal jurisdiction over such a claim. Unlike § 1441, § 1442(a)(1) is not keyed to the "original" jurisdiction of the federal courts. Rather, it is predicated upon an independent right given to federal officers whenever a suit is instituted against them in a state court for any act "under color" of federal office.[5/] Since "original" federal jurisdiction is neither required for removal under § 1442(a)(1), nor relevant under the doctrine of "derivative" jurisdiction, I find it unnecessary to consider whether plaintiff could initially have brought this action in federal court.

It is clear that the removal by the United States Attorney is neither a waiver of the right to question jurisdiction, nor tantamount to a governmental consent to be sued. Minnesota v. United States, supra at 388.

III.

Defendants initially argue that the doctrine of sovereign immunity bars the instant action because it is one brought against the federal government. This doctrine prohibits the maintenance of any suit against the United States in the absence of governmental consent.[6/] Its scope encompasses suits seeking compensation for past harms and those seeking prevention of future ones. Contrary to the Special Prosecutor's contention it is not limited to tort claims.[7/] Likewise, utilization of the doctrine is not restricted to actions where the United States is sued in its own name. The protection of sovereign immunity extends as well to officials and instrumentalities of the government, where the courts characterize the actions of these agents as the acts of the United States.[8/] The denomination of the party defendant by the plaintiff is clearly not the test of whether a suit is against an officer individually or against his principal. Larson v. Domestic & Foreign Corp., 337 U.S. 682, 687 (1949). The general rule is that a suit is against the sovereign if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." Dugan v. Rank, 372 U.S. 609, 620 (1963). There are two recognized exceptions to this rule. Thus, a suit against a government officer in his official capacity will not be regarded as a suit against the sovereign, and hence not subject to defeat by the doctrine of sovereign immunity, if there exists (1) action by officers beyond their statutory powers or (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are unconstitutionally void. Malone v. Bowdoin, 369 U.S. 643, 647 (1962).

There has been no contention by the Special Prosecutor that the United States Attorney has acted in an "unconstitutional" manner. His claim does purport, however, to come under the first exception by alleging that "the United States Attorney is being proceeded against personally for ultra vires acts grossly in excess of his authority as a federal officer."[9/] Resolving this issue would, of necessity, involve a determination of the question whether the United States Attorney abused his discretion in placing Leuci under protective custody and preventing the Special Prosecutor from obtaining access to him. This I decline to do. In view of my conclusion that, quite apart from the sovereign immunity bar, the New York Supreme Court lacked jurisdiction to determine this matter, I see no need to examine the merits of accusations obviously colored by the ill feelings between the litigants.

IV.

There can be little doubt that what the Special Prosecutor sought of Justice Murtagh was the issuance of process in the nature of a writ of habeas corpus ad testificandum.[10/] The question before me, then, is whether a state court is possessed of the power to order the production of an individual in federal custody. Because the resolution of this question touches on several basic assumptions underlying the relationship between state and federal governments, it is necessary to consider the historical antecedents of the doctrine with some care.

The problem of state court power over those in federal custody first came before the Supreme Court in Ableman v. Booth,

62 U.S. 506 (1859). A state court had twice granted writs of habeas corpus to a prisoner held in federal custody on charges of aiding and abetting the escape of a fugitive slave. The Supreme Court, speaking through Chief Justice Taney, unanimously held that a state court lacked power to inquire into the custody of a federal prisoner, even if it concluded that such custody was unconstitutional. In a passage that has such significance for the resolution of the present altercation that it may justify the inordinate length of the quotation, the Court stated:

> "We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can

punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government. And consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a habeas corpus issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." 82 U.S. at 523-524 [Emphasis supplied].

The restrictions which Ableman imposed on the reach of state court process were reaffirmed and strengthened in Tarble's Case, 80 U.S. 397 (1872). There, one Edward Tarble had enlisted in the Army. His father sought and obtained from a state court a writ of habeas corpus discharging him on the grounds that he had enlisted as a minor without his father's consent. The Supreme Court followed Ableman and reversed the judgment of the state court; it denied the authority of a state court to consider, by way of habeas corpus, the legality of any federal detention, be it judicial or executive. The Court placed particular emphasis on the supremacy of the Constitution and the concomitant supremacy of the federal

government. "There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. ... Such being the distinct and independent character of the two governments, ... it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority." (80 U.S. at 406-407). Tarble expanded the holding of Ableman in two significant respects. First, the Court did not limit the definition of custody to confinement pursuant to a judgment of conviction in a federal district court; any constraint imposed by an agency of the federal government is sufficient. Second, the Court refused to limit Ableman "to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority." In other words, state inquiry must cease when an arguable claim of federal authority is asserted, whether or not such claim ultimately proves to be valid.

Since Ableman and Tarble, there has been no serious challenge to the principle that state courts possess no power to remove a person from the jurisdiction of federal courts or agencies by writ of habeas corpus. The principle has been consistently reaffirmed both in academic fora[11/] and by various courts which have addressed the question.[12/] It is, in fact, simply a variant of the well established doctrine that the court which first assumes control over

the subject matter of litigation — be it persons or property shall retain exclusive jurisdiction over it until it has exha its remedies. See Covell v. Heyman, 111 U.S. 176 (1884). In speaking of a federal prisoner in Ponzi v. Fessenden, 258 U.S (1922), the Supreme Court stated: "Until the end of his term his discharge, no state court could assume control of his bod without the consent of the United States." See also, Stewart United States, 267 F.2d 378 (10th Cir. 1959), cert. denied, 3 U.S. 844 (1959); Little v. Swenson, 282 F.Supp. 333 (W.D. Mo. Hollman v. Wilkinson, 124 F.Supp. 849 (M.D.Pa. 1954).

New York State has recognized, by recent legislative actment, the necessity of securing the consent of federal aut in order to obtain control of a witness in federal custody. of the Criminal Procedure Law, set out in full in the margin,[1] provides that a state court may issue a writ of habeas corpus testificandum requesting the Attorney General of the United S to furnish the witness in state court. Although this statute itself implicitly acknowledges the ineffectuality of state pr further acknowledgement can be found in the accompanying prac commentary. It is there noted that "this section cannot affe actions of the federal government in this area, but only give statutory authority to employ this procedure when federal off are willing to cooperate."[14/]

The Special Prosecutor seeks to escape the force of t Ableman principle by arguing that Leuci's confinement does no constitute a state of custody sufficient to defeat the execut of state court process. He points out, quite correctly, that

phrase "protective custody" is a coinage which cannot be found in the text of §§ 501-504 of the Organized Crime Control Act. This statute, he argues, merely authorizes the Attorney General to provide security for government witnesses; it does not impose on such witnesses a condition of custody within the meaning of Ableman and its progeny.[15/]

The United States Attorney, in turn, contends that the protection authorized by §§ 501-504 is sufficient to constitute the requisite custody. Alternatively, he notes that although Leuci has not indicated any desire to leave the protection of the federal marshals, were he to do so he would be arrested and arraigned as a material witness pursuant to 18 U.S.C. § 3149.[16, 17/] See Bacon v. United States, 446 F.2d 933 (9th Cir. 1971). In either case, it is argued, Leuci is in the effective custody of the United States and thus beyond the reach of state process.

There is ample support in analogous situations for giving "custody" an expansive definition. In Jones v. Cunningham, 371 U.S. 236 (1963), the Supreme Court was confronted with the question of whether a parolee was "in custody" within the meaning of 28 U.S.C. § 2241 and thereby entitled to petition for a writ of habeas corpus. The Court, in holding that a parolee was indeed "in custody," stated: "[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." The Court found that the regular

incidents of the parolee's status, such as confinement to a particular job, community, and style of living, were constraints sufficient to constitute "custody". See also, Donigan v. Laird, 308 F.Supp. 449 (D. Minn. 1969); Schlanger v. Seamans, 401 U.S. 487 (1971

A definition of custody as broad as that evolved in Jones would surely encompass the restrictions placed on Leuci's liberty by the federal government here. Yet it can be argued, not without some cogency, that the definition of custody employed for purposes of determining eligibility for habeas corpus relief need not be the same definition used in gauging the reach of state process. Although I do not necessarily accept that argument, I think it proper that I address it nevertheless. The definition of custody here, I submit, must be a functional one: it must harmonize with the principles of federal autonomy developed in Ableman and Tarble. Of critical importance, then, is the Court's observation in Tarble that the state and federal governments constitute "distinct and independent" spheres of authority, and under no circumstances can state court process reach into the federal sphere. The real question before me, then, is not merely whether Leuci's freedom of movement is restrained. Obviously, the protection he requires demands rather elaborate restraints, such as the continuous presence of federal marshals. Rather, one must consider the degree to which Leuci falls within the sphere of federal authority. If he is indeed within that ambit, the mandate of Ableman and Tarble requires that he be beyond the reach of state process. Any other result would frustrate the principal of federal supremacy.

Although I do not pass upon the merits of his position, I am satisfied that the United States Attorney has shown that Leuci's demonstrable relation to the case of United States v. Rosner, noted earlier, makes him an object of continuing federal concern. Leuci was the principal witness at trial, and a challenge to his credibility is the crux of Rosner's new trial motion. The resolution of this question is of vital importance both to the government and Mr. Rosner. Because the United States Attorney is entitled to pursue his ongoing investigation into Leuci's credibility, it follows that Leuci falls within the sphere of federal authority as that term was defined in Ableman and Tarble. He is therefore beyond the reach of any writ of habeas corpus issued by a state court.

V.

The Special Prosecutor has suggested several additional bases of state court jurisdiction. All of these contentions are easily met.

Initially it is argued that the federal court would have the authority to grant the relief requested in this proceeding were it brought in the District Court in the first instance.[18/] For this proposition I am directed to 28 U.S.C. § 1361 which confers upon the district court "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[19] I fail to see the relevance of this section where it is the state court's jurisdiction which is at issue. Even were I to accept plaintiff's sweeping contention here, a matter of substantial

doubt,[20] it is clear that § 1361 provides no jurisdictional basis for a state court and I likewise derive no authority therefrom under the doctrine of "derivative jurisdiction".

Plaintiff next refers to New York Penal Code §§ 195.05 (Obstructing governmental administration) and 215.10 (Tampering with a witness) as "applicable state laws" whose standards have been violated by the United States Attorney's Office.[21] Quite aside from the fact that these are criminal statutes, they are plainly designed to grant the state courts authority to punish the offender, not to order the production of witnesses. They clearly fail to provide any jurisdictional basis for the case at bar.

The final argument presented by the Special Prosecutor is that both the state and federal courts have "inherent powers" to insure that their proceedings are not interfered with and to supervise the administration of justice. For reasons previously stated I find no need to consider the "original" jurisdiction of the federal court in such matters. With regard to the power of the state court alluded to here, I have been unable to locate any authority for the granting of the relief sought nor has plaintiff directed the court's attention to any statutes or cases in point. §§ 750 and 753 of the New York Judiciary Law, cited in the plaintiff's memoranda, merely grant the state court the power to punish for criminal or civil contempt. Such power would obviously come into play here only after an order of the court had been duly issued and ignored. Contempt is no more than a tool to enforce the authority of the court in matters where it has jurisdiction. To contend,

therefore, that the jurisdiction itself is derived from the contempt statute begs the question.

Conclusion

The Special Prosecutor has failed to allege any jurisdictional basis for the granting of the relief sought. For all of the reasons previously stated, the order to show cause obtained from Justice Murtagh is vacated and the plaintiff's action is dismissed.

SO ORDERED.

Dated: May 13, 1974

U. S. D. J.

Footnotes

1/ See Willingham v. Morgan, 395 U.S. 402 (1969); Tennessee v. Davis, 100 U.S. 257 (1879).

2/ 28 U.S.C. § 1442(a)1 provides:

> "(a) A civil action or criminal prosecution commenced in a State Court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending;
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

3/ The defendant Posner was convicted of five of the eight counts, and his conviction has been affirmed by our Court of Appeals, 485 F.2d 1213 (2d Cir. 1973). A petition for certiorari is now pending in the United States Supreme Court.

4/ Organized Crime Control Act of 1970, Title V, provides:

> "Sec. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.
>
> "Sec. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

"Sec. 503. As used in this title, 'Government' means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

"Sec. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title."

5/ In cases like this one, Congress has decided that federal officers and indeed the federal government itself, require the protection of a federal forum. Willingham v. Morgan, 395 U.S. 402 (1969).

6/ Consent is usually in the form of legislation (i.e. Federal Tort Claims Act). No such consent is asserted here.

7/ See Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949); Leonhard v. Mitchell, 473 F.2d 709 (2d Cir. 1973), cert. denied 412 U.S. 949 (1973); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Von Hennig v. Clark, 76 N.Y.S.2d 350 (Sup. Ct., N.Y. 1947).

8/ Note, Developments in the Law : Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827, 829 (1957).

9/ Plaintiff's Supplemental Memorandum, p. 13.

10/ The order signed by Justice Murtagh provided, in pertinent part:

"Upon a reading of the annexed affidavit of Special Assistant Attorney General Stephen J. Fallis; it is

ORDERED: that the United States Attorney for the Southern District of New York and the Chief United States Marshal show cause why an order of this Court should not be entered directing them to produce Detective Robert Leuci before a Grand Jury empanelled by this Court; and it is further

ORDERED: that the United States Attorney for the Southern District of New York and the Chief United States Marshal

show cause why they should not desist from interfering with and preventing the appearance and testimony of Detective Robert Leuci before a Grand Jury empanelled by this Court ...."

Although it is not denominated an application for a writ of habeas corpus ad testificandum, the show cause order plainly seeks to require federal authorities to produce a person in their custody before a state grand jury. That is precisely the object of such a writ.

Elsewhere in papers submitted to this court the Special Prosecutor claims that he simply sought the opportunity to serve Leuci with a subpoena. Although such relief is nowhere requested in the show cause order, such omission is immaterial. Ableman v. Booth, infra, draws no distinction between writs of habeas corpus and other forms of state court process.

11/ See, e.g., Warren, Federal and State Court Interference, 43 Harv. L.Rev. 345 (1930); Note, Limitations on State Judicial Interference with Federal Activities, 51 Columbia L.Rev. 84 (1951); Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385 (1964); 1 Moore's Federal Practice ¶ 0.6[5].

12/ Robb v. Connolly, 111 U.S. 624 (1884); Ex parte Royall, 117 U.S. 241 (1886); Perez v. Rhiddlehoover, 247 F.Supp. 65 (E.D.La. 1965); United States ex rel. Fort v. Heisznor, 319 F.Supp. 693 (N.D. Ill. 1970).

In Fort, supra, the federal court, citing Ableman and Tarble, issued an injunction restraining the execution of a writ of habeas corpus ad prosequendum on a federal prisoner temporarily removed from another jurisdiction.

13/ "§ 650.30 Securing attendance of prisoner in federal institution as witness in criminal action in the state

1. When (a) a criminal action is pending in a court of record of this state by reason of the filing therewith of an accusatory instrument, or a grand jury proceeding has been commenced, and (b) there is reasonable cause to believe that a person confined in a federal prison or other federal custody, either within or outside this state, possesses information material to such criminal action or proceeding and (c) the attendance of such person as a witness in such action or proceeding is desired by a party thereto, a superior court, at a term held in the county in which such action or proceeding is pending, may issue a certificate, known as a writ of habeas corpus ad testificandum, addressed to the attorney general of the United States, certifying all such facts and requesting the attorney general of the United States to cause the attendance of

such person as a witness in such court for a specified number of days under custody of a federal public servant.

2. Such a certificate may be issued upon applicationoof either the people or a defendant, demonstrating all the facts specified in subdivision one.

3. Upon issuing such certificate, the court may deliver it, or cause or authorize it to be delivered, to the attorney general of the United States or to his representative authorized to entertain the request."

14/
See also C.P.L. § 580.30 and the accompanying commentary.

15/
See 1970 U.S. Code Cong. and Admin. News 4024.

16/
18 U.S.C. § 3149:

> "§ 3149 Release of material witnesses
>
> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

17/
The Special Prosecutor contends that were Leuci arraigned as a material witness pursuant to § 3149, he would be entitled to bail. Were he able to meet the bail fixed, the argument continues, he would at that point be effectively free of federal constraint and thus amenable to state process. In the present posture of the case, that objection is purely hypothetical and one which I accordingly need not consider.

18/
Plaintiff's Supplemental Memorandum, p. 12.

19/
Emphasis added.

20/
Traditional teaching views mandamus as appropriate solely to

compel officials to comply with the law when no judgment or discretion is involved in that compliance (i.e. ministerial duties). Although this principle has been somewhat opened to question in recent court decisions, it remains undisputed that § 1361 only creates a means of enforcing a duty owed to one by a government official and a plaintiff who fails to establish such a duty will be denied mandamus relief by the federal courts. Leonhard v. Mitchell, 473 F.2d 709 (2d Cir. 1973), cert. denied 412 U.S. 949 (1973).

21/ Plaintiff's Memorandum, p. 2; plaintiff's Supplemental Memorandum pp. 2-3.